

EXPLAINING JUDICIAL INDEPENDENCE IN THE EAST ASIAN
DEVELOPMENTAL STATES:
THE CASE OF TAIWAN

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ABSTRACT

David Kar Wor Ma: Explaining Judicial Independence in The East Asian Developmental States:
The Case of Taiwan
(Under the direction of Evelyne Huber)

Taiwan presents an intriguing case regarding the emergence of judicial independence in new democracies since it cannot be conveniently explained by the existing theories. In this paper, I offer a model of judicial independence to resolve the puzzle, highlighting the role of private corporations having close ties with the government that is characteristic of the East Asian countries. Within this framework, despite single party dominance the ruling party is motivated to grant unconditional judicial independence to the court, allowing it to effectively check against the growing power of the corporations. It is also predicted that the dominant party would pursue strategies that can promote unconditional judicial independence by overcoming the credible commitment problem arisen from its unique relation with the corporate sector. This would include a three-part solution that involves formal rules, communications strategies, and appointment strategies. The theory finds support from an in-depth case study.

To Baby Alison

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The rule of law with an independent judiciary is universally recognized as a cornerstone of modern democratic societies. In particular, in constitutional democracies, the constitutional document, designed to protect basic human rights as well as to define and limit the powers of the government, must be upheld by justices who answer to no political masters. As such, constitutional courts whose role is to conduct constitutional reviews play an important part in democratic development. Yet, the challenge of explaining how the court, which Alexander Hamilton had characterized as having ‘no influence over either the sword or the purse’, may actually achieve independence from power-holders remains an intriguing question to many political scientists who participated in the ‘judicialization of politics’ research agenda during the past decade or so. A lot has been achieved, but still much is yet to be uncovered.

This paper aims at contributing to the ongoing effort in specifying the conditions and causal mechanisms for judicial independence pertaining to constitutional courts in the context of new democracies in East Asia, and in particular Taiwan. East Asian countries have so far been very understudied regarding this research topic, with the rare exception of Ginsburg who applies the ‘insurance theory’ to explain the variation in constitutional court independence in Taiwan, Mongolia, and South Korea.¹ Moreover, Japan’s poor record of constitutional court independence² can also be conveniently explained by the insurance theory. Nevertheless, Ginsburg’s presentation of the Taiwanese case has been subjected to sound criticisms that the empirical evidences do not support his argument that Taiwan’s judicial independence has anything to do with power diffusion among its political parties. This paper attempts to present an alternative ‘credible commitment theory’ that addresses this outlier case, and finds empirical support for the theory.

¹ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge, UK: Cambridge University Press, 2003).

² Percy R. Luney, Jr., “The Judiciary: Its Organization and Status in the Parliamentary System,” *Law and Contemporary Problems* 53, no. 1(1990):135-62; Mark J. Ramseyer and Eric B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (Chicago, IL: The University of Chicago Press, 2003).

I. Literature Review

I.a. The Developmental State

This section mainly covers the literature on judicial independence, although a brief mentioning of the developmental state literature first would be helpful. The definitive works in this area³ describe the developmental state as an autonomous state that, for reasons such as ‘systemic vulnerability’,⁴ is incentivized to promote economic development. Typically, it spearheads an export-oriented economic developmental program for the country, characterized by anti-neoliberal industrial policies, by forming a close partnership with domestic business groups, buying time for strategic industries to incubate internationally competitive firms. The state is instrumental in offering subsidies, policy loans, political suppression of labor, protection from international competition, stabilizing the macroeconomic environment, and various forms of assistance. According to Peter Evans’ seminal study, there are only three archetype developmental states that truly meet the demands – Japan, Taiwan, and South Korea. During their respective developmental stages, each of these countries was governed by a state that had enough capacity to effectively administer and communicate its policies, as well as the needed autonomy to act independently from their corporate partners. The S. Korea state, in particular, enforced a strict and internally competitive environment, one often harsher than what normal market pressure may impose, in order to continually upgrade corporate performance. For example, in the ‘60s it was not uncommon for those Korean chaebols surviving the market but failing to meet performance targets to be dismantled by the state and having their assets claimed by other better-performing chaebols.

³ Chalmer Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975* (Stanford, CA: Stanford University Press, 1982). Alice H. Amsden, *Asia's Next Giant: South Korea and Late Industrialization* (New York: Oxford University Press, 1989). Peter B. Evans, *Embedded Autonomy: States and Industrial Transformation* (Princeton, NJ: Princeton University Press, 1995). Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton, NJ: Princeton University Press, 1990).

⁴ Richard F. Doner, Bryan K. Ritchie, and Dan Slater, "Systemic Vulnerability and the Origins of Developmental States: Northeast and Southeast Asia in Comparative Perspective," *International Organization* 59, no. 2 (2005): 327-61.

One key implication of the developmental state literature that is relevant to the present study is that business-government relationship may sour when the developmental state matures.⁵ A successful developmental state eventually breeds a corporate sector that is increasingly powerful economically, less dependent upon protections from international competition, and can solicit funding conveniently from international capital markets. The corporate sector may have both the incentive and the clout to fight for freeing itself from the discipline imposed by the state, to bargain for a bigger piece of the pie in their numerous profitable joint projects, or even to capture the state regarding policies and regulations. For example, merger and acquisition activities in S. Korea in the early '80s frequently ignored the Fair Trade and Anti-Monopoly Act enacted in 1981 that was designed to contain the power of the chaebols.⁶ In Taiwan from the late '80s onwards, businessmen-turned-lawmakers at both the national and the provincial levels received enormous profits from obtaining 'sweetheart' contracts in numerous large-scale public construction projects.⁷

I.b.i. *Theories of Judicial Independence*

Following the framework delineated by Vanberg⁸, the literature on theories explaining judicial independence in democratic contexts can be categorized into endogenous incentive models and exogenous costs models. The first category assumes that power-holders can undermine judicial independence without incurring much cost, but choose not to do so because they, *on balance*, receive direct or indirect benefits by allowing the judiciary to remain independent. The direct benefits include information benefits, shifting blame (to the court), or help maintaining the separations of powers. The indirect benefit models are exemplified by the 'insurance theory'⁹, which assumes risk-averse political

⁵ Eun Mee Kim, *Big Business, Strong State: Collusion and Conflict in South Korean Development, 1960-1990* (Albany, NY: State University of New York Press, 1997).

⁶ Kim, *Big Business, Strong State*, 195.

⁷ Ming-Chang Tsai, "Dependency, the State and Class in the Neoliberal Transition of Taiwan," *Third World Quarterly* 22, no. 3: 370.

⁸ Georg Vanberg, "Constitutional Courts in Comparative Perspective: A Theoretical Assessment," (Forthcoming).

⁹ Mark J. Ramseyer, "The Puzzling (In)Dependence of Courts: A Comparative Approach," *The Journal of Legal Studies* 23, no. 2 (1994): 721-47. Matthew C. Stephenson, "'When the Devil Turns ...': The Political Foundations of Independent Judicial Review," *Journal of Legal Studies* 32, no. 1 (Jan 2003): 59-89. Ginsburg, *Judicial Review*.

parties seeking political hedges. The theory asserts that, when there is long-term expected power diffusion among major political parties (meaning that they are expected to alternate in office), it can be beneficial, under certain conditions, for all parties to cooperate in mutual concessions in terms of their policy positions. In other words, a party agreeing not to over abuse its power against its opponents when it is in office, given that its opponents agree to do the same, would be a win-win deal given that each has a considerable chance of losing office from time to time. But since the boundary values of such arrangement are often unclear, an independent arbiter, i.e. the Court, is needed to enforce this equilibrium by calling the boundaries.

It should be explained that the ‘on balance’ benefits mentioned above means that the maintenance of judiciary independence is an all-or-nothing ‘package deal’, which is largely assumed by the literature. The power-holders cannot surgically resist only those judicial decisions they dislike while allowing independence to prevail in other judicial decisions. They can either grant full judicial independence or not at all, and they find the former ‘on balance’ more appealing. To be specific, however, the exact scope to which the ‘package deal’ assumption applies may cover just a certain type of court, e.g. the constitutional court, the administrative court, or the ordinary courts, etc., instead of the entire judiciary. In any case, the point of the literature is that case-by-case intervention would be difficult.

The insurance theory is frequently the starting point in models addressing judicial independence in newly democratized countries, but these models also adjust the theory to fit the new context. For example, Popova subscribes to the central role of power diffusion but argues that the insurance theory neglects the immediate benefits of enforcing a subservient judiciary in newly democratized countries where typically higher benefits and lower costs associated with attempting to control the court prevail.¹⁰ In particular, a subservient judiciary can help the incumbent government proactively maximize its chance of re-election, by imprisoning or disqualifying the rival candidates, or declaring their financing activities

¹⁰ Maria Popova, "Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine," *Comparative Political Studies* 43, no. 10 (2010): 1202-29.

illegal. Aydin presents a similar argument, albeit identifying slightly different cost and benefit factors.¹¹ They back up their claim with case examples addressing Pakistan and Russia in the 2000s as well as Ukraine in the late 1990s. Unlike the insurance theory, these models assume myopic leaders and deny an exogenous chance of electoral success based on power diffusion alone; and it is precisely when the parties are equally competitive that a subservient judiciary, by tipping the balance, becomes the most effective. This conclusion is at odds with the insurance theory proponents, who see intensive political competition as a catalyst to judicial independence. In fact, in a separate subsection titled ‘Insurance in New Democracies’, Ginsburg suggests that ‘other things being equal, [greater] uncertainty [in new democracies] increases demand for the political insurance that judicial review provides.’¹² More recently, Epperly¹³ argues that the more undemocratic a regime, the higher the cost associated with losing office; thus, provided that there is electoral competition, it would be of greater salience and therefore there would be a greater incentive to insure.

The key idea of the insurance theory can be generalized into the following: when the incumbent political leadership is faced with a powerful opponent who may threaten to exert influence over the judiciary when assuming political power, then it may find it preferable to allow judicial independence. The essential element here is power diffusion, not insurance. The act of insurance is, as demonstrated by Popova and Aydin, only one of the possible outcomes in response to power diffusion, under certain assumptions such as the absence of myopia. Another one of such assumptions that both sides of the debate adopt is that the powerful opponent must be a rival political party, which actually should not be taken for granted. Here is where the developmental state literature may prove relevant – a power diffusion between the state and the private corporate sector does not engender an expectation of alternation in office, and thus leaves no demand for rational hedging (insurance); yet the powerful private corporate sector may

¹¹ Aylin Aydin, "Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition," *Law & Society Review* 47, no. 1 (2013): 105-34.

¹² Ginsburg, *Judicial Review*, 30.

¹³ Brad Epperly, "Political Competition and Judicial Independence in Democracies and Non-Democracies," Article under review.

exert influence over the judiciary to its own advantage vis-à-vis the state via its close connections with the state. In this situation, the state may find it beneficial to grant independence to the judiciary.

The second category, i.e. exogenous cost models, asserts that judicial independence is possible because attacking the judiciary is costly to the power-holders, regardless of whether they see an independent judiciary as beneficial or not. In this paper, this is referred to as *unconditional independence*, as opposed to *conditional independence* achieved in the endogenous incentive models. The source of this costliness is most commonly the public support for the judiciary (although foreign sources can also be a possibility), which can be explained either as a result of the court proving to be more aligned with the people's interests than the power-holders in an imperfect system of democratic representation,¹⁴ or as a need for a coordinator of spontaneous citizen understandings and actions against otherwise ambiguous constitutional infringements.¹⁵ This latter argument presents the court decision as a focal point around which the public establishes the consensus that counter-action towards the power holders is clearly needed; and since the public treasures this function of the judiciary, it will protect its independence that is necessary in ensuring its proper functioning. However, both arguments require the judiciary to have a good public reputation that normally takes time and effort to accumulate (and this is especially true in newly democratized countries). As such, most exogenous costs models take into account the strategic interactions between the court and other players in order to meet this requirement. For example, Epstein, Knight, & Shvetsova¹⁶ posit that constitutional courts strategically make decisions that rationally remain within the tolerance intervals of various power-holders. The relevance of this behavioral pattern to the emergence of judicial independence is that doing so skillfully would, in the longer term, expand these intervals, thus allowing the constitutional court a greater autonomy. The 'building up [of] a reservoir of goodwill among political actors and the public alike' is a function of repeatedly remaining within the

¹⁴ Matthew C. Stephenson, "Court of Public Opinion: Government Accountability and Judicial Independence," *Journal of Law, Economics, & Organization* 20, no. 2 (2004): 379-99.

¹⁵ Georg Vanberg, "Substance Vs. Procedure: Constitutional Enforcement and Constitutional Choice," *Journal of Economic Behavior & Organization* 80, no. 2 (2011): 309-18.

¹⁶ Lee Epstein, Jack Knight, and Olga Shvetsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government," *Law & Society Review* 35, no. 1 (2001): 152.

tolerance level itself as well as accepting ‘safe’ cases only, e.g. civil rights cases instead of those related to separation of powers matters.¹⁷

The theoretical significance of endogenous cost models, and the proactive role of the judiciary in general, can hardly be underrated in the literature. However, the exact way the judiciary, and in particular the constitutional court, may build up its reputation is far from clear. Although the principle of having the constitutional court making decisions that offend neither the public nor the power-holders is likely indisputable, the practice of handling ‘safe’ cases only, i.e. civil rights cases, as suggested by Epstein, Knight, & Shvetsova, does not seem to effectively work towards this goal at least within our present context. Many civil rights such as self-defense, privacy right, freedom of speech and association, etc., are politically sensitive, involving the limitation of the power of the police and other government departments. If the constitutional court decides to act within the tolerance level of the power holders in these cases, it may further harm its own reputation and thus receives even less public support.

Aside from reputation, the role of public relations in organizing public support is emphasized by both Vanberg¹⁸ and Staton.¹⁹ If the power holders are wary of the potential of a public backlash, then the expectation of sufficient media coverage of the constitutional court’s decisions would induce the court to act more independently. Moreover, Staton also pays attention to the possibility that the court itself is equipped with the resources to economically promote its own case decisions, which is particularly relevant when the public’s accurate understanding of its jurisprudential rationale is crucial to generating the needed public support. Under this theoretical framework, media coverage is a necessary but not sufficient condition for unconditional judicial independence.

Finally, the role of internal politics is being increasingly recognized. The case of the Russian constitutional court elaborated in Epstein, Knight, & Shvetsova, detailing the internal conflicts among the

¹⁷ Epstein, Knight, and Shvetsova, “Role of Constitutional Courts”, 152.

¹⁸ Georg Vanberg, "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review," *American Journal of Political Science* 45, no. 2 (2001): 346-61.

¹⁹ Jeffrey K. Staton, "Constitutional Review and the Selective Promotion of Case Results," *American Journal of Political Science* 50, no. 1 (2006): 98-112.

justices within the Court, highlights the importance of the internal politics within a judiciary that often cannot be assumed a unitary actor. In addition, Lax²⁰ demonstrates examples of studying court legal policy determination that address the collegiality and hierarchy within the judicial system. Although these are inspiring works that contribute to the development of a relatively new area in judicial politics research, not much has been done that directly connects the internal politics of the judiciary to explaining its independence.

I.b.ii. *The Role of Formal Institutional Rules*

One particularly important and controversial issue found within the literature concerns the role of micro-level formal institutional rules that supposedly enforce judicial independence, e.g. rules that specifies the appointment procedures of judges, the length of their terms and whether renewal is an option, etc. It is noteworthy that within all the theories that have been covered by the previous subsection, these formal rules play a minimal role. They are not at all the focus of those theoretical frameworks, in the sense that the scholars are not trying to look into what political interactions would give rise to the needed formal rules that in turn ensure judicial independence. For example, the insurance theory implicitly asserts that as long as there is power diffusion among political parties, and that agents are risk-averse and not myopic, then with certain utility functions assumed there would be judicial independence regardless of whether the appropriate formal rules are in place.

Nonetheless, earlier accounts of the debate see some keen attention paid to emphasizing the contributive role of formal rules. In his introductory chapter of '*Judicial Independence in the Age of Democracy*', Russell asserts that 'the focus of *any* practical endeavors to secure judicial independence must be on institutional arrangements designed to protect independence', and that 'it is only through consideration of the full range of pressures and forces impinging on judges... that a comprehensive theory

²⁰ Jeffrey R. Lax, "Political Constraints on Legal Doctrine: How Hierarchy Shapes the Law," *The Journal of Politics* 74 (2012): 765-81.

of judicial independence can be built.’²¹ Regarding the ‘full range of pressures and forces’ Russell is not referring to anything in the likes of public backlash, but instead a full range of institutional rules related to appointment, removal, remuneration, case administration, personnel, etc. plus the possibilities of physical threats and bribery.²²

Yet, during the past decade or so, it seems that the academic community have gradually reached the consensus that the study of judicial independence is not about the study of formal rules. This is brought about by the accumulation of empirical studies that do not support a positive correlation between de jure judicial independence (as defined by formal rules) and de facto judicial independence. For example, in his paper on judicial reform and independence in Brazil and Argentina, Brinks writes that ‘most scholars acknowledge that formal institutional arrangements (secure tenure, salary protection, etc.) correlate poorly (indeed, often negatively) with actual independent behavior on the part of the courts’.²³ He highlights Shaw’s analysis of Latin American countries in which Uruguay and Costa Rica is placed ‘dead last’ in terms of formal rules; but this ranking, if used as a predictor of de facto judicial independence, would ‘surprise most scholars of the region’.²⁴ Even more relevant to this present study is the quantitative testing performed by Garoupa, Grembi, & Lin on the Taiwanese judiciary. Despite the fact that the formal rules for the appointment process of Taiwan’s grand justices accorded disproportional influence to the ruling parties during 1988-2008, they don’t find it a significant factor in explaining the grand justices’ decision making.²⁵ As such, scholarly attention diverted away from formal rules towards the underlying political dynamics between the judiciary and the power holders. Hilbink writes conclusively that ‘although there may be practical advantages to limiting scholarly inquiry to the formal

²¹ Peter H Russell, "Toward A General Theory of Judicial Independence," in *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, ed. Peter H Russell and David M. O'Brien (Charlottesville: University Press of Virginia, 2001), 8.

²² Russell, "Toward A General Theory", 13-21.

²³ Daniel Brinks, "Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?" *Texas International Law Journal* 40, no. 3 (2005): 597.

²⁴ Brinks, "Judicial Reform and Independence", 597.

²⁵ Nuno Garoupa, Veronica Grembi, and Shirley Ching-ping Lin, "Explaining Constitutional Review in New Democracies: The Case of Taiwan," *Pacific Rim Law & Policy Journal* 20, no. 1 (2011): 5, 24.

type of judicial independence [(referring to the formal rules)], ultimately it is positive independence that many scholars seek to explain.’²⁶ Stephenson also writes that ‘formal protections are not sufficient to evaluate the true independence of the judiciary.’²⁷ Even more to the point, Brinks concludes that ‘unless the goal is explaining institutional design per se... the concept of formal independence is singularly unhelpful.’²⁸

However, in a very recent paper, Melton and Ginsburg argue that although it is true that even the most well-designed formal institutional rules do not automatically translate into de facto judicial independence, they do matter. Regarding this, Melton and Ginsburg offer two highlights. First, they adopt the focal point argument in the exogenous cost literature pioneered by Weingast²⁹ and apply it in the context of formal rules. It is aforementioned that the public has the incentive to protect judicial independence due to the judiciary’s role in facilitating collective actions against constitutional infringements by offering a focal point through its rulings. However, whether the power holders are indeed obstructing judicial independence can itself be an ambiguous issue, creating a secondary collective action problem. This is where formal rules come into play. Specifically, when a formal rule protecting de jure judicial independence is introduced into the constitution, in case it is breached it provides a focal point that contributes to organizing a collective action that protects the judiciary.³⁰ This theory assumes that the formal rules are sufficiently clear and specific³¹ so that any breach is self-evident, without calling for another court ruling (so a formal rule that merely states that the judiciary should be independent would not be good enough). The second highlight that Melton and Ginsburg make is their emphasis on

²⁶ Lisa Hilbink, "The Origins of Positive Judicial Independence," *World Politics* 64, no. 4 (2012): 588.

²⁷ Matthew C. Stephenson, "Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs," Harvard University, n.d., 2.

²⁸ Brinks, "Judicial Reform and Independence", 597.

²⁹ Barry R. Weingast, "The Political Foundations of Democracy and the Rule of Law," *The American Political Science Review* 91, no. 2 (1997): 245-63.

³⁰ James Melton and Tom Ginsburg, "Does De Jure Judicial Independence Really Matter?: A Reevaluation of Explanations for Judicial Independence," *Journal of Law and Courts* 2, no. 2 (2014): 192.

³¹ Melton and Ginsburg. "De Jure Judicial Independence", 193.

introducing formal rules conjunctively. In order to make these rules effective, it is important that several of them coexist so that the various means of attacking the court are well covered, as ‘those who wish to interfere with courts need only find one hole in the judicial armor’.³² Although Melton and Ginsburg, based on their statistical analysis, particularly favors the combination of formal rules pertaining to the appointment as well as removal of the justices, what constitutes a good combination may vary from country to country depending on their larger institutional environments.

³² Melton and Ginsburg, "De Jure Judicial Independence", 194.

II. A Credible Commitment Theory of Judicial Independence

This section develops a theory of judicial independence that attempts to achieve three objectives. First, it aims at incorporating the concepts of power diffusion (present in many endogenous incentive models) and public support (present in the exogenous cost models) into a single causal mechanism. Second, it interprets the concept of power diffusion flexibly such that it does not necessarily entails competitiveness among political parties. Specifically, it addresses a situation in which despite single (political) party dominance, power diffusion is achieved due to the presence of a powerful *private* corporate sector (the ‘corporate’ hereon), as exemplified by the Taiwanese developmental state at its mature stage. Third, the theory aims at demonstrating how granting unconditional judicial independence can actually be difficult for the dominant party, and proceeds to explain how the difficulty can be overcome by credible commitment strategies. The theory identifies the independence of the constitutional court as the ultimate dependent variable, but involves the independence of the ordinary court judges as an intermediate one.

The theory acknowledges the insurance theory as an adequate explanation of judicial independence when there is power diffusion among political parties. Among the East Asian developmental states, S. Korea experienced such power diffusion immediately after democratization while Japanese politics had been dominated by a single party for over forty years since its democratization after WWII. Their respective high and low degrees of constitutional court independence are therefore consistent with the prediction of the insurance theory. However, Taiwan also experienced single party dominance, yet its constitutional court made some remarkable progress in terms of its independence from the dominant party. This calls for an alternative theory that can better explain the outcome observed in Taiwan, namely how judicial independence may nonetheless emerge under single party dominance.

A few conceptual clarifications need to be made. First, in this paper, Fiss' characterization of judicial independence is adopted, including three dimensions: party detachment, individual autonomy, and political insularity of the judges.³³ In the political context of single party dominance, this characterization mainly refers to a court independent from the dominant party. Second, the state is basically controlled by the dominant party ('state' or 'party-state' hereon). A powerful corporate sector can join the dominant party as members but it is not assumed to be part of the party leadership, so it does not directly control the party. The corporate leaders can also join the ranks of the legislators, and on a bill-by-bill basis it may be able to form ad hoc alliances and have the legislature pass the bills it favors. The corporate does not join the executive and does not directly influence the judiciary, but through the developmental partnership it can exert indirect influences: threatening to play non-cooperative in the joint projects, so as to force members of the dominant party or the party-state to pressure the court to act in accordance with its preferences. The dominant party and the corporate are the only powerful players in the political arena, which is almost always the case in a developmental state.

The theory holds the following assumptions. Their necessity would be apparent later in this section when the model is further elaborated.

- **A1:** The judiciary is headed by the judiciary leadership, a person who exercises strong control over all regulations internal to the judiciary.
- **A2:** The formal rules governing the operation of the judiciary, i.e. those pertaining to the appointment, tenure, and removal of the constitutional court justices and those pertaining to case administration and personnel issues (following Russell's categorization) that apply to ordinary court judges, can exist in the form of legislations, constitutional provisions, and regulations internal to the judiciary. The judiciary leadership exercises strong internal control regarding the regulations internal to the judiciary.

³³ Owen M. Fiss, "The Limits of Judicial Independence," *The University of Miami Inter-American Law Review* 25, no. 1 (1993): 60-67. The 'party' in 'party detachment' refers to the parties involved in each court case, not political parties.

- **A3:** In newly democratized countries, the judiciary, which has typically acted as an instrument of the previous authoritarian regime (a la Popova and Aydin), is endowed with poor reputation in the beginning.
- **A4:** The constitutional court is unable to build public support by making decisions within the dominant party leadership's tolerance intervals, or selectively accepting 'safe' cases only. In newly democratized countries (and especially when the incumbent dominant party continues to be in office) the office-holders are far from perfect representatives of the people, therefore acting within their tolerance intervals may avoid attacks but would not contribute to judicial reputation.
- **A5:** The public does not distinguish between the constitutional court and the ordinary courts (or any other component members of the court system) when it comes to its support for the judiciary. To the public, it is just 'the court' in general.
- **A6:** There exists a group of reformist judges at the lower echelon of the judicial system (typically at the district courts), whose history traces back to the authoritarian regime before democratization. These people seek integrity, impartiality, and independence, and are typically suppressed by the regime (and therefore remain at the lower echelon), but regain their activism after democratization. There exists another group of conservative judges at the higher echelon of the system (typically at the higher courts or the higher levels of the district courts), who have close ties with the dominant party leadership ('party leadership' hereon).
- **A7:** The party leadership is much more concerned with court cases involving the corporate than other cases handled by the ordinary courts, because there is no other interest group (opposition party, labor union, etc.) powerful enough, or expected to be powerful enough, to challenge the dominant party. The party leadership is also concerned with constitutional court cases, in which its policies made via the executive or the legislative branch can potentially be struck down.

As aforementioned, a developmental state at its mature stage may encounter a great challenge since its potent elite corporate partners gain bargaining power against the state and seek to expand their

political influence. The powerful corporate and the dominant party thus form a kind of power diffusion: the latter remains the senior partner of the two, but can no longer so freely ‘arm twist’ the former as it used to. However, the effect of this power diffusion cannot be captured by the logic of either the insurance theory or the ‘separation-of-powers’ thesis,³⁴ because the dominant party and the corporate neither are expected to alternate in office or power, nor seek to operate independently. The party-state’s success on one hand depends upon a tight cooperation with the corporate, but on the other hand hinges on its own autonomy from excessive external influence. When the corporate grows powerful, it becomes increasingly difficult to impose this discipline without jeopardizing the cooperation.³⁵

The credible commitment theory perceives this challenge as the context in which the dominant party leadership makes its decision regarding judicial independence. The party leadership may find it beneficial to allow judicial independence for two reasons. First, an independent court can discipline the corporate in accordance with the law and thus contributes to restraining its growing power, while a court subservient to the dominant party would fail to do so since the party-state itself is subject to the influence of the powerful corporate through their cooperative economic relationship. Second, an independent court allows the party-state to freely express a position supportive of the corporate which is important to maintaining their cooperative relationship, knowing that this has no effect upon the court’s decision. On the other hand, from time to time an independent court’s ruling may contradict the party leadership’s preferred outcome, and as such there is a tradeoff. The relevant court at issue here refers to the ordinary courts of the judiciary system, which typically handle cases related to the corporate.

However, it should be noted that if it is at all desirable for the party leadership to grant judicial independence, this independence must be unconditional. In the generic scenario associated with conditional judicial independence in which the party leadership finds it beneficial to allow the judiciary to act independently, all it has to do is not to attack the court, but is otherwise not obliged to commit to any

³⁴ Vanberg, “Constitutional Courts”, 9.

³⁵ This will be less of an issue if the dominant party or the state owns most of the corporate. However, this was not the case in S. Korea and Japan, and it had been the case in Taiwan only up to the early ‘80s when the private Taiwanese corporate were still not very powerful. This point will be further elaborated in the next section of the paper.

specific actions or policies. However, in the case of the maturing developmental state, the resultant conditional judicial independence would not be sustainable since the powerful corporate would find ways to pressure the party leadership to reverse its decision. Therefore, although endogenous benefits explain the party leadership's initial motivation (if one exists) to allow judicial independence, it must then turn the resultant independence into an unconditional one if it is to be sustainable, i.e. to make it a credible commitment so that it becomes very costly to reverse the policy and therefore the corporate finds it not worthwhile to apply pressure. In summary, the party leadership faces two issues regarding its decision on judicial independence: whether it is desirable and whether it is feasible. The first is attended to below, while the second would be addressed in the next subsection.

II.a. Judicial Independence -- Desirability

Table 1 displays the expected payoffs of the party leadership regarding its decision on unconditional judicial independence under four possible scenarios. At times, the dominant party leadership desires to reward or punish the corporate via the court as a means to discipline it. The court's (true) preferences regarding the cases when they arise can differ from the dominant party leadership's, but this is relevant only if there is unconditional judicial independence. Together they form the four mutually exclusive and collectively exhaustive scenarios.

The dominant party leadership encounters two types of expected payoffs in accordance with the previous discussion.³⁶ The first type is the relative payoff associated with having the court's final decision matching the party leadership's preference (V). If unconditional judicial independence is granted, then this matching is just coincidental (scenarios 1 and 4). If it is not granted, then this payoff is assured only when the dominant party leadership wants to reward the corporate anyway, i.e. scenarios 3 and 4. Even though the party-controlled court always issues decisions matching the dominant party leadership's preference, yet when the decision speaks against the corporate, the corporate would retaliate through various means of non-cooperation such that the party leadership may back off. This is the case in

³⁶ All payoffs are relative expected payoffs appropriately discounted for the future, and assume positive values.

scenarios 1 and 2, in which there is only a certain probability of success attached to this negative decision ($q; q < 1$), and therefore the payoff component equals qV in these two scenarios. On the other hand, when there is unconditional judicial independence any retaliation is deemed ineffective in nullifying the decision, because it would be too costly for the party leadership to yield to the retaliation and reverse the judicial independence. Therefore the value of this payoff component in scenario 1 under conditional judicial independence is V instead of qV . The second type is the relative payoff derived from position-taking (P). With unconditional judicial independence, the party leadership can always express support for the corporate, knowing that this support has no effect on the judicial outcome. This supportive official stance is contributive to maintaining the cooperative relationship between the party-state and the corporate in pursuit of their developmental projects. In the absence of judicial independence, however, this relative payoff component is assuredly present only when the dominant party leadership wants to reward the corporate anyway (scenarios 3 and 4). When it doesn't (scenarios 1 and 2), the party leadership will rule against the corporate via the court if $qV > P$, or will give up doing so and instead opts for expressing support if $qV < P$, resulting in a payoff of $\max(qV, P)$ for both scenarios. The dominant party leadership cannot capture both qV and P because its judicial action against the corporate would immediately discredit its supposedly supportive position. Finally, in scenario 3 under unconditional judicial independence, even though the court rules against the corporate, practically speaking the party leadership should be able to quite conveniently compensate the corporate through other means, even though such compensation may not be a perfect substitute for a favorable ruling. Therefore, an additional payoff component rV is introduced, where $r < 1$ but not much smaller. The same logic does not apply to scenario 2, however. Under unconditional judicial independence, if the court rules in favor of the corporate, it is not reasonable to assume that the dominant party leadership can conveniently punish the corporate through other means, both because of the relative shortage of such means and because doing so would again render the position-taking non-credible.

Table 1: Expected Payoffs of Dominant Party's Decisions on Unconditional Judicial Independence

Scenario	Dominant Party's Preference	Court's Independent Preference	Payoff under Unconditional Judicial Independence	Payoff under No Judicial Independence
1	Punish Corporate	Punish Corporate	$V + P$	$\text{Max}(qV, P)$
2	Punish Corporate	Reward Corporate	P	$\text{Max}(qV, P)$
3	Reward Corporate	Punish Corporate	$P + rV$	$V + P$
4	Reward Corporate	Reward Corporate	$V + P$	$V + P$

The decision of the party leadership is such that it will favor unconditional judicial independence if the overall expected payoff under this arrangement is greater than that without it, taking into account some probability distribution over the four scenarios. When the corporate grows in power, q decreases because it is more likely that the corporate can have its way, P increases because it is increasingly important for the party leadership to express support if it wants to maintain the cooperative relationship, and the probability distribution biases towards scenarios 1 and 2 because the party leadership feels a greater urgency to discipline the corporate. In particular, among cases in which the corporate actually violates the law (scenarios 1 and 3), the party leadership desires less to protect the corporate, meaning that the probability of scenario 1 increases vis-à-vis scenario 3. Other variables are not affected. As a result, the dominant party leadership is always indifferent in scenario 4, and converges towards indifference in scenario 2 (with q decreasing and P increasing), rendering them insignificant in the overall decision. It always prefers unconditional judicial independence in scenario 1 and no judicial independence in scenario 3. However, since the probability distribution biases towards scenario 1 and away from scenario 3 as the corporate becomes increasingly powerful, and moreover the incremental gain of unconditional independence in scenario 1 (which converges towards V) is much larger than its incremental loss in scenario 3, i.e. $(1-r)V$, the overall effect of a maturing developmental state is to promote unconditional judicial independence as the dominant party leadership's desirable choice.

II.b. *Unconditional Judicial Independence – Feasibility*

When the dominant party leadership decides to grant unconditional independence to the judiciary's ordinary courts, there inevitably arises a credible commitment problem that needs to be resolved. The theory here offers a three-part solution to the problem.

The first part of the solution makes use of formal rules as a commitment device, based on the rationale first laid out by Weingast and applied by Melton and Ginsburg. In this case the party leadership would introduce a collection of clear and specific formal rules intended to conjunctively protect the independence of the ordinary court judges. Although the presence of these formal rules per se does not carry with it the authority to ensure compliance, they generate a focal point effect that contributes to the organization of public backlash whenever they are breached or reversed. However, this focal point effect against breach and reversal can be fruitful only if the judiciary enjoys good public reputation. If the judiciary hasn't accumulated enough public reputation, then even if everyone is aware of the breach and everyone agree that it is a breach, the public backlash would fail to take place because people do not think that the judiciary adequately serves citizens' interests in the first place. Based on A3 and A4, therefore, the first part of the solution by itself is insufficient.

The second part of the solution attempts to modify upon the theory above. The idea is that formal rules matter in two ways, not just one – both the message (the rules) and the medium (their communications process) are important. The significance of communications has been emphasized by Vanberg and Staton, but here it takes on a different role. Instead of the court, it is the party leadership who invests in a promotional campaign surrounding the ratification of the formal rules so as to credibly commit to unconditional judicial independence. For example, they can be ratified after a prestigious international organization has been hired to look into the matter, with a high profile press conference held to introduce them to the public, during which high-ranking officials make speeches emphasizing their importance. If the rules are breached or reversed thereafter, this will bring about a public (electoral) backlash since the action signals inconsistency and untrustworthiness on the part of the power holders. In other words, the party leadership artificially makes it costly to renege on its promise of judicial

independence, thereby turning it unconditional. There are three noteworthy features here. First, it is the communications process of the formal rules, and not the formal rules alone, that generates a focal point effect that brings the public's attention to the power holders' inconsistent actions. Second, this focal point effect against inconsistency and untrustworthiness would contribute to organizing a public backlash regardless of the judiciary's public reputation, since the public's evaluation of the power holders' quality as reflected by their actions is independent of its perception about the judiciary. Third, this focal point effect should be most pronounced in the short run, i.e. when the formal rules are breached or reversed not long after their ratification. As such, it works well in conjunction with the first part of the solution. In the short run, unconditional judicial independence is supported by the second focal point effect, enabling the ordinary courts to begin building their public reputation. In the longer run, when the reputation has sufficiently improved, the first focal point effect of the formal rules kicks in as well, further reinforcing the court's unconditional independence.

The third part of the solution involves the unique role of the judiciary leadership. In order to credibly commit, the party leadership can appoint what may be called a 'dedicated and senior' judicial leadership to carry out various policies that promote judicial independence. A 'dedicated' person is defined as someone having the self-interest to empower the judiciary via unconditional independence. This person regards the judiciary as her own power base, and aims at acquiring power by empowering the judiciary. She is likely to have a legal background, and plans to spend the rest of her political career within the judiciary. A 'senior' person is defined to be someone high-ranking and powerful within the dominant party. Once appointed, the senior judiciary leadership is assumed to enjoy considerable autonomy and thus not just a pawn of the party. Her appointment is more a negotiated outcome between her and the (rest of the) party leadership. The office is more earned than assigned, and is one of the positions prized by the top leaders of the dominant party. Due to her dedication, the judiciary leadership will pursue judicial independence via formal rules internal to the judiciary, mixing in the focal point effects of the first two parts of the solution. To be sure, means to achieve judicial independence other than formal rules can also be pursued under the protection of the judiciary leadership even though they lack the

additional benefit of the focal point effects, especially when formal rules are not an option. Essentially, the dedicated judiciary leadership acts on behalf of the party leadership, but it is at the same time in her own interest to do so. Importantly, due to her seniority, the judiciary leadership is autonomous enough to resist requests of reversing the judicial independence. In other words, it would be very costly for the dominant party leadership to effectively renege, because it is difficult to overcome the judiciary leadership's power and it is very costly for the judiciary leadership to comply.

The role of the dedicated and senior judiciary leadership as either a credible commitment strategy or a condition to the theory needs to be clarified, and so is the probabilistic relation between judiciary leadership and judicial independence. The following three scenarios all assume single party dominance. In the first scenario, the party leadership does not consider corporate power as a threat and does not support judicial independence, while the judiciary leadership is senior and dedicated. In this case theoretically the judiciary leadership can still pursue judicial independence alone because she has the power to do so, but doing so against the party leadership's will can be costly,³⁷ and so the probability of this happening is positive but small. In the second scenario, the party leadership considers corporate power a threat and wants to grant judicial independence, while judiciary leadership is senior and dedicated. In this case judiciary leadership's pursuit of judicial independence is assured. In both cases the dedicated and senior judiciary leadership is a condition to the theory and it has already been fulfilled. In the third scenario, the party leadership wants to grant judicial independence but the judiciary leadership is either not dedicated or not senior, or both. In this case the condition to the theory is instead an opening through which the judiciary leadership can be replaced, e.g. retirement or voluntary resignation, upon which the party leadership may appoint a dedicated and senior judiciary leadership in order to credibly commit. Before this opportunity emerges, this judiciary leadership may still idiosyncratically welcome and pursue judicial independence; but since the major attraction or feasibility of unconditional judicial independence loses its relevance under this scenario, it is again not very likely to happen.

³⁷ Note that this is different from the scenario under which the party leadership reneges, because here the judiciary leadership has not yet made any credible commitments, and therefore complying to the party leadership's will is less costly.

II.c. Judicial Independence – Endgame

The context of the newly democratized country offers both an opportunity and a challenge to the judiciary leadership regarding the constitutional court. When a country democratizes, public support begins to matter as potentially a major cost to anyone trying to attack the constitutional court, because the collective action problem associated with coordinating an effective public backlash diminishes when people can conveniently vote and elections are meaningful.³⁸ Therefore the dedicated judiciary leadership has an incentive to achieve unconditional judicial independence through gradually accumulating public support. However, the initial condition of the judiciary she is endowed with enjoys no public support at all in accordance with A3, without which the constitutional court must play within the tolerance intervals of the party leadership in order to avoid attacks. But according to A4, this continual obedience does not in turn accumulate public reputation, leading to a stable and undesirable equilibrium in which the judiciary leadership finds it difficult to make any progress.

The desire of the dominant party leadership to grant unconditional independence to the ordinary courts offers a breakthrough to this dilemma. When the credible commitment problem is resolved by the aforementioned three-part solution, the ordinary courts' reformist judges as depicted by A6 would be free to act impartially and with integrity upon cases, especially those involving corporate corruptions and unfair practices. These cases, close to the public and attracting considerable media attention, would gradually earn reputation and accumulate public support for the court. This result is in the interest of the dedicated judiciary leadership, and it is therefore costly for the judiciary leadership to fulfill any request of reversing the judicial independence granted to the ordinary court judges. Moreover, in accordance with A5, such public support would then spill over to the constitutional court and therefore in the longer term, the constitutional court too can achieve unconditional judicial independence. Once the constitutional court can act outside of the party leadership's tolerance intervals, demonstrating impartiality and integrity, without being attacked by the dominant party, this act itself would earn further public support, leading to

³⁸ Vanberg, "Constitutional Courts", 20-21.

a self-reinforcing equilibrium, which is again in the interest of the judicial leadership. This completes the mechanism that explains how the constitutional court gains unconditional independence under single-party dominance in a newly democratized developmental state.

III. The Case of Taiwan: Empirical Evidence

In a nutshell, the credible commitment theory presented in the previous section posits that if three conditions are fulfilled in the developmental state, i.e. single party dominance, power diffusion between the state and the corporate, and an opportunity to appoint a dedicated and senior judiciary leadership, then ordinary court unconditional independence would first be granted, followed by an improvement in the judiciary's public reputation, and finally the unconditional independence of the constitutional court would be achieved. This section of the paper seeks to empirically verify the theory for the case of Taiwan. The first subsection investigates whether the three conditions were indeed fulfilled in Taiwan and the timing of these fulfillments. The following subsections then investigate the three milestones of the causal mechanism implied by the theory, each as a hypothesis to be tested. Again, the timing of these events, namely the second must take place after the first and the third must take place either immediately or shortly after the second, is crucial in offering support for the theory.

III.a.i. Single Party Dominance

Taiwan's fulfillment of the 'single party dominance' condition as a newly democratized country is not apparent at the outset. Although it is difficult to pinpoint when democratization first took place in Taiwan, the formation of the opposition Democratic Progressive Party (DPP) in 1986 (which was against the law but was tolerated by the regime) arguably marked the beginning of a new era. In 2000, DPP candidate Chen Shui-bian won the presidential election. It is therefore convenient to assume that DPP gradually ascended to power during this fourteen-year period, and as such it would be dubious at best to describe the incumbent party Kuomintang (KMT) as 'dominant' during the 1990s.

However, this was not the case. Tsai, in his paper tracing the roots of Taiwan's neoliberal economic policy, comments that 'until 2000 Taiwan was dominated by an authoritarian party, the

KMT.’³⁹ When responding to the insurance theory, Chang also expresses that ‘the reasons that the Council of Grand Justices [i.e. the Constitutional Court] was invested with strong powers during the early years of democratization were in no way due to competitive power politics or political diffusion. During those years, the KMT was strong and it remained its great strength...’⁴⁰

These comments are not without empirical support. Table 2 presents the results of the most important elections in Taiwan between 1989 and 2001 in terms of party performance, which include the presidential elections, the legislative elections, and the National Assembly elections.⁴¹ The percentage votes each presidential candidate received and the percentage seats each party was able to secure are reasonably good indicators of each party’s respective relative political power.

Table 2: Party Performances in Major Elections in Taiwan, 1989-2001

Election	P party	KMT		DPP		CNP		PFP	
		Seats	%	Seats	%	Seats	%	Seats	%
1989 Legislative Yuan		91	72.3	21	16.1				
1991 National Assembly		254	78.2	66	20.3				
1992 Legislative Yuan		95	59.0	51	31.7				
1995 Legislative Yuan		85	51.8	54	32.9	21	12.8		
1996 National Assembly		183	54.8	99	29.6	46	13.8		
1996 Presidential		Lee & Lien (%)		Pang & Hsieh (%)					
		54.0		21.1					
1998 Legislative Yuan		123	54.7	70	31.1	11	4.9		
2000 Presidential		Lien & Siew		Chen & Lu (%)				Soong & Chang (%)	
		23.1		39.3				36.8	
2001 Legislative Yuan		68	30.2	87	38.7			46	20.4

Source: Wikipedia, Chinese Wikipedia

The objective here is to determine at which point in time power diffusion could be reasonably expected in Taiwan. Note that it is the expectation of sustained power diffusion and not power diffusion per se (especially if it is temporary) that is most relevant to both the insurance theory and the present

³⁹ Tsai, "Dependency", 363.

⁴⁰ Tom Ginsburg et al., "Judicial Review in New Democracies: Constitutional Courts in Asian Cases," *National Taiwan University Law Review* 3, no. 2 (2008): 169.

⁴¹ In Taiwan, the National Assembly was the original legislature of the Republic of China (ROC) founded in 1912. Until 1992, its members were those elected in 1948 before the ROC was forced to move to Taiwan, and re-election was not supposed to take place until KMT reclaims the mainland. In the 1990s however, Taiwan underwent a series of Constitutional amendments to gradually shift the responsibilities of the National Assembly to the Legislative Yuan (Taiwan’s new legislature which existed before the 1990s but only assumed limited responsibilities), while in the meantime the two entities co-existed and each held their own elections. The National Assembly became effectively defunct by 2000 and was formally dissolved in 2005.

study. One of the potential justifications for reasonably expecting power diffusion is the continual rise of DPP's popularity. It can be observed from the Table that DPP rose quickly in power during its first few years of electoral participation. While in the 1989 election it only received 16.1% votes, this increased sharply to 31.7% in the 1992 election. At that point however, despite the advancement it had achieved, it was hardly in any position to challenge KMT, which secured 59.1% votes in the 1992 election, almost doubling DPP's. In other words, DPP's upward trend must continue beyond 1992 for it to remain a potential justification for reasonably expecting power diffusion. This did not happen. The percentage votes DPP received in the four subsequent elections in 1995, 1996, 1996, and 1998 generally settled at around 30% (with the exception of the 1996 presidential election, which was 21.1%), which means that DPP did not manage to make any progress within a lengthy six-year period. The results of the 1998 election confirm that at that point KMT was still far more powerful than DPP, a situation not much different from that in 1992.

Yet in the 2000 presidential election, KMT, which had so far never failed to secure majority votes in any major elections, received a stunningly poor 23.1% support rate. DPP's Chen and Lu won the election with 39.1% votes, while independent candidates Soong and Chang finished in a close second place and founded the People First Party (PFP) afterwards.⁴² In order to explain this outcome, attention should turn away from DPP towards KMT itself, and in particular the history and significance of KMT factionalization after democratization, as a potential justification for reasonably expecting power diffusion.

After the death of Chiang Ching-Kuo and his handpicked successor Lee Teng-hui became ROC's president as well as KMT chairman in 1988, the balance of power between the mainlander group and the local Taiwanese group within KMT began to tilt in favor of the latter, which had long been politically suppressed. Lee, a local himself, immediately formed a 31-member Central Committee of which 16 members were locals. He also pushed policies regarding mainland China, democratic reforms, and party restructuring that he and his more reform-minded coalition hold a very different stance from the

⁴² For the ease of illustration, Soong and Chang are placed under the 'PFP' column in Table 2, but actually the party was founded by Soong right after the 2000 presidential election.

conservative mainlanders. At the forefront of the conflict were the plan to substitute the Legislative Yuan for the National Assembly and the debate over the criteria and procedure for selecting KMT chairman and vice-chairman. Lee emerged as the winner subsequently but at the heavy expense of party unity. During the 14th Party Congress in 1993, KMT leadership was so divided that six legislators and some old guard members ended up quitting the party and formed a separate Chinese New Party (CNP). Other old guards who chose not to leave KMT formed a wide variety of political factions within the party, aiming at claiming some degree of political autonomy from the Lee-presided central leadership.⁴³

The impact of KMT's internal struggles and that of CNP formation was significant but nevertheless not overwhelming at the time. The disunity within KMT often opened up opportunities for the minority DPP to form ad hoc voting alliances with some of its political factions within the legislature on a bill-by-bill basis.⁴⁴ This allowed DPP considerable legislative success especially in areas concerning social welfare and environmental policies as well as corruption,⁴⁵ but not so much in more politically salient and sensitive issues that may potentially alter the overall power structure among the parties. Also, since only a handful of mainlanders quitted KMT to form CNP, the latter remained to be a relatively small political force as reflected by the 13%-14% support level it was able to solicit in the 1995 and 1996 elections. Moreover, as conservative old guards of an earlier era, CNP leadership were even further from DPP along the political spectrum than KMT under Lee, and thus an alliance between CNP and DPP was extremely unlikely.⁴⁶ As such this wave of factionalization, which lasted till 1998 (when CNP popularity began to fade), failed to result in power diffusion -- KMT still emerged as the dominant party in the 1998 legislative election.

In 1999, in anticipation of the 2000 presidential election, it became increasingly apparent that the KMT veteran and popular mayor of Taipei City, James Soong, would emerge as the favorite KMT

⁴³ Michael Ying-Mao Kau, "The Power Structure in Taiwan's Political Economy," *Asian Survey* 36, no. 3 (1996): 294.

⁴⁴ Kau, "Power Structure", 300.

⁴⁵ Kau, "Power Structure", 301.

⁴⁶ DPP leadership actually considered forming a coalition with CNP in 1996, though without much success.

candidate. In a surprising turn of events, however, Lee insisted that KMT must nominate the much less popular Lien Chen as the party's presidential candidate, and the subsequent effort by Lien to secure Soong as his running partner also failed. Soong then decided to run for presidency as an independent, resulting in his expulsion from the party. This highly publicized series of messy happenings naturally turned away many voters, yet even with the split of KMT votes between the two presidential candidates Soong only lost the race by 2.5% to DPP's Chen. It can be conjectured that in the absence of this internal fight KMT would have won the presidential race by a landslide.

Therefore, the critical factor that determined the expectation of power diffusion among political parties in Taiwan throughout the time period was the nature and degree of factional disputes within KMT. In the mid-90s, the CNT and the old guards within KMT did not make a great-enough impact, but by the turn of the century the exodus of Soong almost halved the political power of KMT by splitting it into two bitterly antagonistic parties each of which had a substantial base of popular support. Having said that, it is still doubtful that by the completion of the 2000 presidential election, power diffusion had indeed become a reasonable expectation, because the political power of Soong and his faction as a new party (instead of Soong himself as a presidential candidate) likely remained a considerable uncertainty. It is arguably not until, at best, the 2001 legislative election, in which the PFP obtained a third-ranked but substantial 20.4% votes, that the expectation of a longer-term and relatively stable power balance between DPP and KMT reasonably emerged, despite the fact that it turned out incorrect.⁴⁷ In conclusion, single party dominance in Taiwan lasted until 2000, and power diffusion between the two major political parties could be expected by 2001.

III.a.ii. *State-Corporate Power Diffusion*

One of the major ideas presented in this study is the alternative conception of power diffusion, not among political parties but between the single-party controlled state and the corporate sector, which may nonetheless contribute to judicial independence. However, unlike power diffusion among political

⁴⁷ In 2008, DPP lost the presidential race as well as the legislative election, in which DPP won a mere 27 seats versus KMT's 70, largely due to the scandals surrounding President Chen during his second term. PFP's popularity also did not last. It only won 1 seat in the 2008 legislative election. However, these outcomes were unlikely foreseeable in 2001.

parties which can be inferred from election results, the power balance between the party-state and the corporate, and in particular whether corporate power has matured enough to challenge the party-state in the context of the developmental state, is more difficult to measure and operationalize. In the present study, expert opinions are relied upon instead. Specifically, the objectives are to determine whether there are good rationales in speculating an uptrend in corporate power, and whether there is a general consensus among area experts regarding the sufficient strength of the corporate sector.

In the developmental state literature, it is widely recognized that the private sector plays only a minor role in explaining Taiwan's spectacular economic growth. After the ROC regime had moved to Taiwan in 1949, the relationship between the mainlanders in power (i.e. KMT) and the local Taiwanese public had all along been antagonistic, and therefore forging some form of developmental alliance with the local private business sector did not emerge as a priority of KMT. Also, WWII had left Taiwan with too few resourceful local business leaders to worth KMT's consideration anyway.⁴⁸ Moreover, the sweeping land reform in the 1950s further curtailed the influence of the local landowning elite. As such, the strategy pursued by the Taiwanese developmental state beginning in the 1960s was characterized by industrial policies that channeled capital to selected (mainly upstream) industries occupied by state-owned and KMT-owned enterprises, exploiting scale economy, cheap financing, and other forms of protections. The private business sector mainly owned the downstream industries. Due to the scarcity of capital, it was highly fragmented with small businesses, although as the economy progressed some family-owned diversified business groups expanded to the midstream industries as well.⁴⁹ This lack of a significant role of the private corporate sector is indeed a correct depiction of Taiwan's political economy during its highest growth period from the late 1950s to the mid-1980s. Against this backdrop however, some scholars highlight the dramatic rise of private corporations and conglomerates beginning in the late 1980s and throughout the 1990s, so much so that the authority of the party-state was often challenged. Haggard,

⁴⁸ Kau, "Power Structure", 290.

⁴⁹ Karl J. Fields, "Not of a Piece: Developmental States, Industrial Policy, and Evolving Patterns of Capitalism in Japan, Korea, and Taiwan," in *East Asian Capitalism: Diversity, Continuity, and Change*, ed. Andrew Walter and Xiaoke Zhang (Oxford: Oxford University Press, 2014), 48.

for example, noted that ‘the growth of large firms provided new opportunities for business to air its grievances about governmental policies, lobbying for continued support’, and that ‘[as] the quest for sources of political funding became more intense... the autonomy of the technocrats vis-à-vis business interests declined.’⁵⁰ Koo & Kim also places Taiwan alongside South Korea in terms of ‘big businesses... pursuing their independence from state control beginning in the 1980s.’⁵¹ Other scholars who specialize in Taiwan such as Fields, Tsai, Chu, Wu, and Kau also express similar concerns.⁵²

Taken together, there are three different rationales that explain the rise of private corporate power in Taiwan in the late 1980s. The first is a state-initiated effort to improve economic efficiency, based on the observation that public enterprises are oftentimes not the best competitive vehicle in terms of participating in an increasingly globalized world market. According to Tsai, the Taiwanese state had already recognized this problem in the early 1980s, and engaged in a round of restructuring the public enterprises aiming at efficiency improvement.⁵³ However, as Taiwan had continually felt the imminent need for industrial upgrading throughout the 1980s, Chu explains that it could no longer rely on the state-owned and party-owned enterprises to pursue ‘the dynamics and complexity of technology intensive industries.’⁵⁴ Fields documents that the traditional developmental state in Taiwan aforementioned more or less operated under the framework provided by the 1960 Statute for the Encouragement of Investment (SEI). However, in 1990 the SEI was replaced by the Statute for Upgrading Industries (SUI) that provided the policy framework to ‘incubate a new generation of high-technology firms capable of participating in global value chains as highly flexible OEM suppliers’,⁵⁵ a critical event that marked the inclusion of (and

⁵⁰ Stephan M. Haggard, "Business, Politics and Policy in East and Southeast Asia," in *Behind East Asian Growth: The Political and Social Foundations of Prosperity*, ed. Henry S. Rowen (London: Routledge, 1998), 85-86.

⁵¹ Hagen Koo and Eun Mee Kim, "The Developmental State and Capital Accumulation in South Korea," in *States and Development in the Asian Pacific Rim*, ed. Richard Appelbaum and Jeffrey Henderson (Newbury Park, CA: Sage, 1992), 121-149, quoted in Tsai, "Dependency", 375.

⁵² The rest of the subsection would refer to their respective works.

⁵³ Tsai, "Dependency", 371.

⁵⁴ Yun-han Chu, "Re-Engineering the Developmental State in an Age of Globalization: Taiwan in Defiance of Neo-Liberalism," *The China Review* 2, no. 1 (2002): 40.

⁵⁵ Fields, "Not of a Piece", 57.

reliance upon) private business groups into the state-business developmental alliance. In fact, according to Kondoh, the SUI resulted in the first place from extensive discussions between the bureaucrats and the private sector business leaders.⁵⁶

The second rationale is a US-induced effort to maintain international trade relationship. While Fields sees economic globalization as the underlying driving force, Tsai emphasizes more on international politics when it comes to explaining the economic liberalization initiatives that is also crucial to the ascent of corporate power in Taiwan. According to Tsai, it is not the case that the Taiwanese state bureaucrats adopted wholesale a neoliberal worldview in response to economic globalization in the late 1980s, and then proceeded to pursue privatizations alongside the role expansion of the private sector. Instead, privatization can be traced back to Taiwan's chronically large trade surplus, excessive savings, and relatively weak domestic demand for goods and services,⁵⁷ which were common symptoms among all the East Asian developmental states. In particular, its annual trade surplus with the US had escalated drastically since the early 1980s, peaking at (nominal) USD 17.2 billion in 1987,⁵⁸ prompting the US to retaliate (against S. Korea and Japan as well). The bilateral negotiations took place in 1986, in which Taiwan was in no position to bargain with the US since the US was an overwhelmingly large market to absorb Taiwan's exports. US targeted at the appreciation of the Taiwanese dollar, various kinds of market-opening measures, and privatization initiatives.⁵⁹ What is of particular importance here was that due to the US initiative which included pressuring for liberalizing the financial markets in Taiwan, the Securities Transactions Law was passed in 1988 which led to a proliferation of security houses⁶⁰, while fifteen new private banks were opened in 1991-1992.⁶¹ Benefiting from these reforms, the corporate

⁵⁶ Hisahiro Kondoh, "Policy Networks in South Korea and Taiwan During Democratic Era," *The Pacific Review* 15, no. 2 (2002): 240.

⁵⁷ Tsai, "Dependency", 365.

⁵⁸ United States Census Bureau: Trades in Goods with Taiwan, <https://www.census.gov/foreign-trade/balance/c5830.html>

⁵⁹ Tsai, "Dependency", 366.

⁶⁰ Yu-Shan Wu, "Taiwan's Developmental State after the Economic and Political Turmoil," *Asian Survey* 47, no. 6 (2007): 985.

⁶¹ Tsai, "Dependency", 365.

availed themselves to flexible capital market instruments and enjoyed alternative sources of funding, greatly reducing its reliance on the state, while the state's control over the financial system was essentially dismantled.

It is noteworthy that both of the rationales fit the theoretical framework presented earlier in this study not because the corporate *somehow* attains power diffusion vis-à-vis the state, but because they imply that this outcome of power diffusion remains an extension of the maturation of the developmental state. Even though Taiwan deviates somewhat from the archetype developmental state narrative in that it had been powered mainly by public enterprises for several decades, as the developmental state matured in terms of industry upgrading it was compelled to include the private corporate sector into the core of its business-state alliance; and as the developmental state matured in terms of producing an extraordinarily successful export sector, the resultant neoliberal retaliation from its major trading partner again empowered the private corporate sector via financial liberalization. Yet, historically idiosyncratic factors also played a role in the rise of private corporate power during the time period, cumulating into a third rationale – a Lee-initiated strategy to reconfigure political coalition.

It is mentioned in the previous section that after Lee had assumed presidency in 1988, he led a Taiwanese faction within KMT that fought against the mainlander faction, and eventually won. Tsai sees as a main reason behind this victory his effort in forging a broader coalition, incorporating diverse local interests that mainly included businessmen of Taiwanese origin.⁶² Chu also sees this as a watershed event that marks the beginning of the corporate's perforation into the party-state apparatus.⁶³ Under this arrangement, Lee brought these Taiwanese businessmen into KMT and the Legislative Yuan. In exchange for their political support, he distributed numerous public projects via the executive branch, as well as suppressing labor. Table 3 presents data supplied by Tsai.⁶⁴ Government expenditure as a percentage of

⁶² Tsai, "Dependency", 369.

⁶³ Yun-han Chu, "The Realignment of Business-Government Relations and Regime Transition in Taiwan, " in *Business and Government in Industrializing Asia*, ed. Andrew MacIntyre (Ithaca: Cornell University Press, 1994), 125-127.

⁶⁴ Tsai, "Dependency", 368.

national income, which had been around the 20+% range and was 23.9% at 1988, suddenly jumped to 35.7% in 1989 (the first full year of Lee's presidency), and had remained above 30% until the Asian Financial Crisis in 1997. Until 1995, this fiscal expansion was largely attributed to increased spending in public infrastructure and the acquisition of private lands for such projects.⁶⁵ This coalitional strategy also took great advantage of the scenario engendered by the second rationale. First, the fiscal expansion was conveniently financed by issuing public bonds at low interest rates, exploiting the low domestic demand and high saving rate of the Taiwanese public. This also avoided printing extra money, which may otherwise impede the appreciation of the Taiwanese dollar as demanded by the US. Secondly, although the financial and other sectoral liberalization and privatization programs were imposed by the US, Lee fully welcomed them since the rents released by the process can be translate into valuable political capital in support of financing his broad coalition. As a result, Lee's coalitional strategy 'strengthened the economic and political influence of these private conglomerates'.⁶⁶

Table 3: Government Expenditure as % of National Income (1985-1998)

1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
25.3	26.0	23.1	23.9	35.7	30.2	33.5	35.8	35.8	33.9	32.9	30.5	29.2	28.2

Source: Tsai, "Dependency", 368.

Taken together, the expert opinions that contribute to this niche literature do not diverge when it comes to the significant and growing corporate power in Taiwan beginning in the late 1980s. All of them more or less conform to what Fields describes as a migration from a state-led system to a 'co-governed' system.⁶⁷ Although they present different explanations that account for the phenomenon, the three rationales are not mutually exclusive. They each present a solid standpoint upon which one may reasonably believe that the state-corporate power diffusion was indeed fast becoming a reality during the early 1990s. Moreover, in each of the three scenarios, the state was actively participating in empowering

⁶⁵ Tsai, "Dependency", 367.

⁶⁶ Fields, "Not of a Piece", 56.

⁶⁷ Fields, "Not of a Piece", 48.

the corporate, even though its purpose resided in something else. It is therefore likely that the state was fully aware of the potential threat of a rising corporate power as a consequence, and would thereby act accordingly to mitigate the problem in a timely fashion, including the strategic use of judicial independence.

III.a.iii. *Dedicated Senior Judiciary Leadership*

Regarding this condition, the first task is to verify which of the three scenarios outlined in Section II.a. the case of Taiwan should fall under. Between Taiwan's democratization in 1986 and the year 1994, Lin Yang-kang served as the President of the Judicial Yuan. Although Lin was no doubt one of the top leaders of KMT, serving as its Vice-Chairman between 1993 and 1995, he had no legal career background or formal legal education. More importantly, Lin had been eyeing for the 1996 presidential election since 1990, and he subsequently resigned his presidency (of the Judicial Yuan) in 1994 in preparation for the race.⁶⁸ Lin's judiciary leadership was therefore senior but not dedicated. Empowering the judiciary with independence would neither fulfill his ambition nor fit his relatively short time horizon in heading the Judicial Yuan. Separately, it is known from the previous section that starting from the late 1980s the private corporate sector began to gain power, and therefore at some point thereafter KMT leadership would be considering granting judicial independence. It is therefore clear that from this point in time onwards until Lin's departure, Taiwan fell under the 'third scenario' (see Section II.b.), in which Lin would unlikely pursue judicial independence. Moreover, Lin was arguably the greatest political rival of President Lee within KMT, and it would not be easy for Lee to seek Lin's cooperation in reforming the judiciary in any case.

Since it is the third scenario that is relevant here, the condition yet to be fulfilled was an opportunity to replace Lin. This opportunity came on June 10th 1994 when Lin announced his resignation.⁶⁹ The theory predicts that since at that point all three conditions had been fulfilled, KMT

⁶⁸ Lin lost the presidential election of 1996, with only 14.6% votes. This insignificant share of votes is not included in Table 2.

⁶⁹ Press release from the Office of the President, ROC, <http://www.president.gov.tw/Default.aspx?tabid=131&itemid=3832&rmid=514&word1=%3D&word2=And&word3=%3D>. This date also carries additional explanatory significance. See Footnote 78.

leadership would proceed by negotiating with and appointing a dedicated senior judiciary leadership. By September 1st 1994, Shih Chi-yang assumed his office as the President of the Judicial Yuan. Shih was also a very senior figure within KMT, whose political career included a stint as the Vice Chairman of the Executive Yuan between 1988 and 1993. In addition, he received his doctoral degree in law in Heidelberg, Germany, and had been a law school professor before entering politics. At the age of 60 while taking up his presidency in the Judicial Yuan, he had every reason to expect it to be his last position before retirement. It was therefore in his interest that the Constitutional Court and the ordinary courts (both are under the Judicial Yuan) be empowered with unconditional independence. Shih was clearly both senior and dedicated.

III.b. Unconditional Independence in the Ordinary Courts

Once the three conditions have been fulfilled, the theory predicts that KMT leadership would find ways to credibly commit itself to granting unconditional judicial independence, beginning at the ordinary courts. This subsection of the study is devoted to documenting and evaluating those observed actions as empirical evidences that support this prediction, with close attention to the formal rules involved. Nevertheless, the expected timing of those actions should first be clarified. The previous subsections conclude that: 1) single party dominance in Taiwan persisted until 2001; 2) the expectation of power diffusion between the corporate and the state took place after 1990; 3) a senior and dedicated judiciary leadership had assumed office since September 1994. To be sure, it is difficult to pinpoint the exact timing to which the second conclusion refers, i.e. when exactly KMT leadership actively considered granting unconditional judicial independence due to expecting the said power diffusion, if the credible commitment theory is valid. As such, had it been true that a senior and dedicated judiciary leadership assumed office much closer to 1990, say in 1991, then the situation would impose a challenge for empirical analysis, because a relatively precise prediction regarding the timing of actions cannot possibly be conjectured. Fortunately, since a senior and dedicated judiciary leadership had not actually assumed office until the second half of 1994, the few years' time span separating this event from those critical incidents that began empowering the corporate in 1989/1990 allows one to much more confidently expect

that by 1994 the expectation of power diffusion had already been adopted by KMT leadership, and therefore one may predict quite precisely that the required actions concerning judicial independence should begin around the time Lin resigned and Shih took office. This is indeed what happened.

Between 1994 and 1995 a group of Taichung district court judges initiated two major reforms concerning formal rules – the case-assignment reform and the case-review reform, the latter being the more illustrative demonstration of credible commitment on the part of the judiciary leadership. The case-review system refers to a formal rule that obliges all district court judges to submit their decisions and opinions to the Chief Judge of that same court for review (until the said judge has been promoted beyond a certain rank). Essentially, this rule allowed a relatively small number of partisan judges at the higher echelon of the system to greatly leverage their influence by directly obstructing the independent decision making of the reformist judges, who were mostly lowly ranked. In 1995, after debating about the issue at a judicial reform conference, the Judicial Yuan initially decided not to nullify this rule. The Taichung district court judges immediately protested and began to conduct their daily business without submitting anything for review. In response to this, Shih organized a survey issued to all judges at all levels of the judiciary, asking for their opinion regarding the issue. Not surprisingly, the overall majority did not favor the case review institution. Based on the survey results and against the general preferences of those in the Supreme Court and Supreme Administrative Court, Shih abolished the rule, effective at the beginning of 1996.

The incident offers empirical support for the credible commitment theory. It is beneficial to first briefly discuss the case-assignment reform here, although it will be covered again later. The Court Organization Law at the time stipulated that ‘all the judges in a [district] court are granted the right to decide on case-assignment matters by vote.’ In practice however, the Chief Judge of each district court (typically a conservative and a KMT loyalist) controlled the assignments, which were believed to be a major source of corruption and judicial bias.⁷⁰ It is a telling illustration of the fact that even a clear and

⁷⁰ Chin-shou Wang, "The Movement Strategy in Taiwan's Judicial Independence Reform," *Journal of Current Chinese Affairs* 39, no. 3 (2010): 134.

specific formal rule of de jure judicial independence can be blatantly violated without much consequence when the public support of the court is low and dedicated judiciary leadership is absent. What is relevant about the case-assignment reform is that it took place earlier than the case-review reform, and therefore Shih likely understood that simply abolishing the case-review rule would not be the most effective. The theory predicts that at this stage of low judicial reputation, one way to credibly commit is to build an effective communications process around the formal rule (or in this case, the abolishment of the formal rule). So, instead of quietly eliminating it in an internal conference, Shih kept the rule and allowed the Taichung district court judges to protest against the decision, which of course attracted a lot of media attention. At this point Shih initiated the organization-wide survey that served two purposes. First, similar to the 'prestigious international organization' mentioned in the theory section, the survey was part of the communications process that provided legitimacy and justification to his subsequent decision upon the issue, and thereby making any subsequent act of reneging much costlier. Second, the survey acted as a focal point that orchestrated the otherwise disconnected (mainly) district court judges into a collective voice of expressing their preference against the case-review rule. The end result of abolishing the formal rule with an almost fifty-year history again attracted a lot of media attention. Shih's final decision should not be interpreted as involuntary by assuming that the results of the organization-wide survey revealed the majority preference of disliking the case-review rule, thus leaving Shih with no other choice. Just a year earlier in mid-1994 when Lin was still in office, the Judicial Yuan also issued an organization-wide survey concerning judicial self-governance – in particular asking whether the district court chief justice should be elected internally by the judges of that district court. Despite the majority of judges supporting the idea, the Judicial Yuan indefinitely postponed the consideration, the rather unconvincing reason given being the number of non-respondents and those who did not support the idea was, together, still 'substantial'.⁷¹ The fact that Shih was likely in a capacity to follow suit, but did not, is consistent with the credible commitment theory which says that his true preference was indeed to promote unconditional

⁷¹ Su-min Yang, "Schedule for Judicial Self-Governance Likely Delayed (in Chinese)," *China Times*, May 23, 1994.

independence via abolishing the case-review rule, while his sequence of actions reflected an attempt of credible commitment. Moreover, prior to December 1993 all the reformist judges who had chosen to protest against the system and fought for independence invariably ended up in punishment in one way or another.⁷² It is unlikely that the district court judges had the capacity to push through their intended reforms without the blessing of the judiciary leadership.

Yet the above analysis begs a further question: how can it be confirmed that it is KMT leadership who wanted to pursue unconditional judicial independence and at the same time chose to pursue it through Shih, instead of simply Shih himself acting in accordance with his self-interest? The critical piece of evidence comes from the events associated with the ‘judicial self-governance constitutional amendment’ movement that took place in mid-1994, which on the outset seem to be unsupportive of the theory due to its eventual failure. This movement was arguably the most organized and ambitious attempt in the 1990s on the part of the reformist judges. The focus of the movement involved a letter of request co-signed by 550 judges (more than 50% of the total) in late April addressed to the National Assembly, asking for a constitutional amendment proposal that would improve judicial independence. The request successfully translated into Constitutional Amendment Bill No. 40 in May, motioned by 3 KMT-affiliated members of the National Assembly and co-signed by another 140, mostly KMT-affiliated, members. In a nutshell, the bill sought to establish that judicial administration (such as case assignments) should be determined democratically by ‘judges’ meetings’ (basically each judge holds one vote) and that personnel evaluations should be handled by an independent committee made up of judges, prosecutors, lawyers, and scholars. However, on June 15th the bill was voted down in the First Reading. What is peculiar though was that the three initiators of the amendment bill were all absent. Also, out of the 140 co-signers, only 34 voted in support of it, almost all of whom were DPP and independent delegates.⁷³ Apparently, a large number of KMT-affiliated delegates of the National Assembly were mobilized to vote against the bill in

⁷² Chin-shou Wang, "Judicial Reform in Taiwan in the Past 20 Years: On the Road to Independence (in Chinese)," *Thought and Words* 46, no. 2 (2008): 139.

⁷³ Jia-hui Yang, "Bill Failed to Proceed to Second Reading (in Chinese)," *Zi Li Wan Bao*, June 15, 1994.

short notice, presumably by KMT leadership.⁷⁴ This observation seemingly suggests that KMT leadership did not want to promote judicial independence. Yet, on June 4th, President Lee said during an interview that the immediate priority of the government, after its near-completed constitutional reform, would be to pursue judicial reform.⁷⁵ In late July, he nominated Shih to head the Judicial Yuan. On August 20th, 12 days before taking office, Shih confirmed during an interview that at the meeting with Lee upon which his nomination was confirmed, Lee told him that his main mission would be judicial reform.⁷⁶ This proved to be no mere rhetoric, judging from Shih's subsequent involvements in the case-assignment reform in late 1994, the aforementioned case-review reform in 1995, and the Personnel Review Council reform beginning in 1994, which were ironically not much different from the demands made in Constitutional Amendment Bill No. 40. Moreover, Shih's pursuits were done without any observed complaints from the KMT leadership; and when he retired in 1999, he was succeeded by Weng Yue-sheng who was equally supportive of the reformist judges.⁷⁷ These contrasting evidences make it much more convincing to argue instead that while KMT leadership indeed wanted unconditional judicial independence, it subsequently decided to keep any changes internal to the judiciary and to pursue its goal through the judiciary leadership instead of through constitutional amendments.⁷⁸ Knowing that these were mutually exclusive choices, it made much more sense in terms of credible commitment to rely on Shih who was considerably autonomous and had a long-term interest in unconditional judicial independence than relying on the law-making body. At the time Taiwan was in the midst of a transition in which the fading National Assembly

⁷⁴ For further explanation please see Footnote 78.

⁷⁵ Hui-ying Zhang, "President Lee: Need to Pursue Judicial Administration Reform Right After the Constitutional Reform (in Chinese)." *China Times*, June 5, 1994.

⁷⁶ Jing-wei Zhang and Jin-feng Huang, "Shih Chi-yang: Our Constitutional Politics is Maturing; Our Judiciary is Still Hopeful (in Chinese)," *China Times*, August 21, 1994.

⁷⁷ One of Weng's most visible acts was to reappoint reformist judge Lu Tai-lang as the head of the Personnel Department of the Personnel Review Council. See the section on the Personnel Review Council.

⁷⁸ Note also the timing of Lin's resignation mentioned in Section III.a.iii, i.e. June 10th 1994, when the last of the three conditions to the theory was finally fulfilled and thereby opening up the opportunity to pursue dedicated and senior judiciary leadership as a credible commitment. This took place only five days before the First Reading of the Constitutional Amendment Bill No. 40. It is therefore a reasonable speculation that this is the reason why the KMT delegates so suddenly shied away from supporting the bill on June 15th – some time during the 5 days KMT leadership had decided to capitalize on the opportunity.

was to be replaced by the Legislative Yuan. As aforementioned, Lee's new coalitional strategy included bringing prominent Taiwanese businessmen into the Legislative Yuan. Due to this, Tsai wrote that Lee often had to 'effectively use his presidential power to outweigh the legislative pressure and protected [the] autonomy of the... executive branch',⁷⁹ clearly indicating that at some point during the 1990s, the corporate power within the Legislative Yuan had become substantial. Although this may or may not have already taken place by 1994, it is reasonable to assume that Lee was capable of making such anticipation and thereby decided that the Legislative Yuan provided a less prospective and more uncertain source of credible commitment.⁸⁰ KMT leadership's emphasis on Shih to improve credibility was further affirmed when Shih resigned from all his KMT titles right before he took office in the Judicial Yuan, which was not required by either law or convention at the time.⁸¹ He was also known for refraining from all social gatherings among the KMT senior officials.⁸² As such, when the actions promoting judicial independence are hereby being examined, they do not necessarily have to be directly exercised by KMT leadership or directly demonstrate credible commitment as long as Shih is shown to be involved, because Shih's involvement was itself the credible commitment through which he acted on behalf of KMT leadership.

Another landmark event is the case-assignment reform that took place in December 1993. Nine reformist judges from the Taichung district court held a press conference protesting against the Chief Justice-controlled case-assignment practice. On December 29th, after a few rounds of debate the Taichung district court agreed to vote among all the judges, with a result of 41:34, approving the transfer of the power of case assignment from the Chief Judge back to the ordinary judges. Wang reports that 'many of the other district courts followed suit'.⁸³ This re-enforcement of a formal rule of de jure independence is

⁷⁹ Tsai, "Dependency", 369-370.

⁸⁰ In order to amend the constitution, it required a resolution of 75% of the delegates present at a meeting having a quorum of 75% of the Legislative Yuan. This rule itself was effective until June 2005. Therefore, at minimum the corporate could reverse a commitment to judicial independence in the form of constitutional amendment at 56.25% support rate.

⁸¹ Jin-feng Huang, "Bar Requests Shih and Grand Justices to Quit KMT (in Chinese)," *China Times*, September 23, 1994.

⁸² Chin-shou Wang, "Independent Judiciary, Dependent Judges? Judicial Independence and Supervision under Democracy since Taiwan's Democratization (in Chinese)," *Taiwan: A Radical Quarterly in Social Studies*, no. 67 (2007): 13. Wang expresses in the article that there has yet a good explanation accounting for Shih's cutting his formal and informal ties with KMT.

⁸³ Wang, "Judicial Reform", 144.

certainly an important contribution to unconditional independence of the district ordinary courts, but it also poses two potential challenges to verifying the credible commitment theory. First, the reform took place in December 1993 and succeeded, but that was eight months before Shih took office. Second, assuming that the public reputation of the court remained poor at the time, the theory predicts that the re-enforcement of formal rules would not be effective without some act of credible commitment on the part of either the KMT leadership or the judiciary leadership. Yet both are seemingly absent in this case.

These challenges can be resolved to a large extent by highlighting the fact that all of the district courts individually decided upon case assignment issues, including the case assignment practice itself, only once a year at a year-end meeting. In other words, the many other district courts that ‘followed suit’ must at least wait until year-end 1994 to pass the necessary resolution that transferred case assignment power back to the judges’ community.⁸⁴ This means that aside from one exception, i.e. the Taichung district court, the bulk of the case assignment reform actually took place after Shih had become the president of the Judicial Yuan. Although he had the power to suppress the reform movement, he instead publicly endorsed the case assignment reform.⁸⁵ Once Shih’s involvement in the process is confirmed, one may interpret the case assignment reform in year-end 1994 as an event that took place under the umbrella of KMT’s aforementioned use of Shih himself as a credible commitment device. Nonetheless, the case assignment reform remains only a qualified piece of evidence in support of the credible commitment theory, because the formal rule that underlies case assignment was part of the Court Organization Law that fell under the jurisdiction of the Legislative Yuan instead of Shih. Even if Shih had the power to uphold the law within the judiciary, the corporate sector could potentially change the law if it could gather enough influence within the legislature.

Personnel issues pertaining to promotion and demotion comprise another important area that affects judicial independence. In fact, for a civil law system such as that in Taiwan, Russell writes that ‘the danger point for judicial independence may be more in the process of promotion and career

⁸⁴ The author confirmed this point with C.S. Wang via email correspondence.

⁸⁵ Yung-fu Chen, "Judicial Reform: Three Directions and Schedule Set (in Chinese)," *United Daily News*, September 6, 1994.

advancement than initial appointment.⁸⁶ If the ordinary courts were to be empowered with unconditional independence in a comprehensive way, then the lowly ranked reformist judges could not simply be granted freedom in performing their daily tasks, but in the longer run must also be appropriately promoted in accordance with their performance. This had certainly not been the case before 1994, resulting in the reformist judges resigning or remaining at the lower echelon of the judiciary. The final authority in promoting, transferring, or demoting all personnel in the higher and lower courts resided with the Personnel Review Council of the Judicial Yuan. The Council was made up of 21 members, 10 of whom were supposedly elected internally by the judges. Specifically, 7 of these 10 elected members were supposed to be elected by the district court judges, but this had rarely been practiced. Instead these 7 members were traditionally handpicked by the district court Chief Justices.⁸⁷ In 1994 however, 3 reformist district court justices somehow managed to participate as candidates and were elected. In subsequent years, Wang reported that almost all reformist candidates were unanimously elected into the Council.⁸⁸ Although personnel decisions per se cannot be guided by clear and specific formal rules in order not to obstruct judicial independence, in this case the formal rule pertains to the selection procedure of the Council's members, which can surely be clear and specific. The re-enforcement of this formal rule regarding the 7 elected members allowed alternative voices to be present within the Council. Although as a minority group the reformist Council members could not nominate anyone for promotion, they succeeded in vetoing certain promotions and more importantly, they provided transparency regarding the decision-makings of the otherwise black box-like Council.

Similar to the case-assignment reform the undertakings here were attached with only limited communications strategies, and as such the involvement of the judiciary leadership as a way to credibly commit is crucial to interpreting the Personnel Review Council elections and appointments as empirically consistent with the theory. There are four points to highlight here. First of all, in general the timings

⁸⁶ Russell, "Toward a General Theory", 16-17.

⁸⁷ Chin-shou Wang, "The Rise of Judicial Politics in Taiwan (in Chinese)," *Journal of Taiwanese Politics* 16, no. 1 (2012): 83.

⁸⁸ Wang, "Rise of Judicial Politics", 83.

match, i.e. the reformist judges' entry into the Council began in 1994 and continued thereafter, which corresponded with Shih's tenure in the Judicial Yuan. Secondly, despite the previous point, the 1994 Council election took place on August 19th, 12 days before Shih took office. So it is a bit controversial as to whether he was involved in that particular event. Since his presidency was confirmed in July, it is possible that Shih might have exerted some behind-the-scene support, but there is no evidence to confirm this speculation. Thirdly, it is nonetheless clear that he did not back up the district court Chief Justices in the subsequent years, otherwise it would be difficult for the reformist judges to continually participate or participate successfully in the Council elections. Finally, in 1998 Shih showed his most clear-cut support for the Personnel Review Council changes by directly appointing outspoken reformist judge Lu Tai-lang to head the Personnel Department of the Council that was in charge of all promotion proposals,⁸⁹ which until then were inaccessible to the reformist group.⁹⁰ Taken together, there are ample empirical evidences of Shih's involvement.

The judicial reforms that have so far been presented should not mislead the audience into believing that these are the only major judicial reforms in Taiwan during the 1990s; nor should it convey the impression that the mission of attaining judicial independence in the ordinary courts had been completed within Shih's tenure. Nevertheless, it is true that in no other time periods during the decade had several judicial reforms specifically pertaining to judicial independence been introduced more or less concurrently. It is also true that although it would take some more years before democratic case assignments extended to the higher courts and that the Personnel Review Council was adequately represented by reformist judges, the reforms that took place mainly during the first two years of Shih's tenure made a significant impact on the judiciary's public reputation, a point to be empirically verified in the next subsection of the paper.

⁸⁹ The Personnel Review Council was divided between the Personnel Department and the Review Department. The former was responsible for motions and the latter was responsible for approvals.

⁹⁰ Wang, "Rise of Judicial Politics", 84.

III.c. *Public Reputation of the Judiciary*

The credible commitment theory predicts that a significant improvement in the public reputation of the judiciary in Taiwan should follow the judicial independence reforms that took place in the ordinary courts during 1994/1995. This section of the paper is devoted to seeking empirical evidences that verify this hypothesis. The time span between the two events should be flexible to a reasonable extent. While it is impossible to specify exactly how much time it would take before the public perception of the judiciary begins to improve, the claim of a causal relation between the two events would certainly become less convincing if the improvement only came many years after the initial judicial reforms.

The empirical challenge in testing the hypothesis resides in the unavailability of directly relevant data. A number of surveys had been conducted in Taiwan that included questions associated with how the court was being perceived. However, these surveys were mostly completed after 2000. The only survey that had been conducted at least once in or before 1995 and at least once after 1995 is the ‘Taiwan Social Change Survey’ organized by Academia Sinica.⁹¹ However, the respective questions pertaining to the judiciary asked in this survey’s 1992, 1993 and 1998 rounds were very different, and therefore the results cannot be meaningfully compared.

Without any reliable indicator of the judiciary’s public reputation during the relevant time period, the hypothesis can nonetheless be supported by an alternative piece of empirical evidence in conjunction with a conclusion established in Section III.b. This relevant piece of evidence points to the characteristics of the five presidents of the Judicial Yuan after Taiwan’s democratization in 1986, presented in Table 4. It is already aforementioned that Lin was senior but not dedicated, while Shih was both senior and dedicated. Of importance here is Weng who succeeded Shih in 1999 when the latter retired. Like Shih, Weng had a strong academic background in law, earning his doctoral law degree in Germany and taught at a Taiwanese law school. Moreover, he had served as a Grand Justice since 1972, and was 67 when he took over the presidency. He therefore definitely qualified for a dedicated judiciary leadership. Unlike Shih

⁹¹ <http://www.ios.sinica.edu.tw/sc/>

however, Weng had minimal political presence outside the judiciary and was not a senior figure within KMT. In fact, he was not even a KMT member. This characteristic of a dedicated but non-party affiliated judiciary leadership is shared among all Judiciary Yuan presidents after Shih.⁹²

The relevance of this switch in appointment strategy in 1998⁹³ must be interpreted in light of the status quo appointment strategy adopted since 1994. The evidence presented in Section III.b. associated with the ‘judicial self-governance constitutional amendment’ movement establishes that KMT leadership’s strategic rationale for appointing a senior and dedicated judiciary leadership, i.e. Shih, was to credibly commit to granting unconditional independence to the ordinary courts. KMT leadership found this move necessary basically because the judiciary was lacking a good public reputation that would generate public support that in turn makes reneging costly, and so it must instead artificially manufacture this costliness through other means. If four years later KMT leadership abandoned this strategy by appointing a judiciary leadership without the ‘seniority’ element (seniority means seniority within KMT as previously defined), then it can only imply that the judiciary’s public reputation was perceived by KMT leadership as having significantly improved by 1998.

Table 4: Presidents of the Judicial Yuan since 1987

President	Year	Age ¹	Party	Career Background	Senior	Dedicated
Lin Yang-kang	1987-1994	59	KMT	Exe. Branch and KMT	Yes	No
Shih Chi-yang	1994-1999	60	KMT	Exe. Branch and KMT; law professor	Yes	Yes
Weng Yue-sheng	1999-2007	66	None	Career Judge; law professor	No	Yes
Lai In-jaw	2007-2010	61	None	Executive Branch; law professor	No	Yes
Rai Hau-min	2010-present	71	None	Lawyer	No	Yes

¹ Age at the time of becoming the president of the Judicial Yuan

Source: Chinese Wikipedia, Baidu Baike

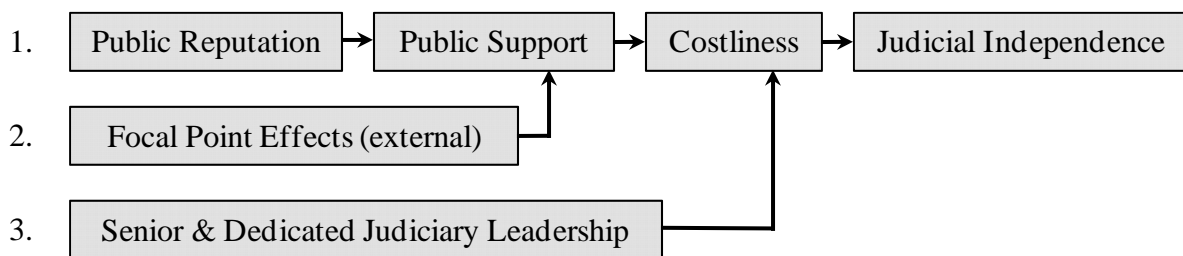
To be more specific, the fact that KMT leadership no longer regarded ‘seniority’ as necessary may imply five different possibilities on the outset. This can be better illustrated with the aid of Figure 1, in which pathway 1 is the causal mechanism established by the existing exogenous cost literature and

⁹² Of the three presidents after Shih, only Lai had significant political presence outside of the judiciary. He had held various positions at the Ministry of Finance, the Taiwan Provincial Government, and the Executive Yuan before heading the Judicial Yuan. However, he too was not a member of any political party.

⁹³ Weng took office in 1999 but was officially nominated in December 1998 by President Lee.

pathway 3 is the alternative established in Section III.b.⁹⁴ The first possibility is that powerful corporate forces managed to successfully put pressure upon KMT leadership to reverse its credible commitment strategy at the point Shih retired, and as a result a non-senior Weng was appointed. Although it was in the interest of Weng to promote judicial independence since he was dedicated, he was not powerful enough to resist any external political pressure. However, if this was indeed the case, then the event must be followed by KMT leadership instructing Weng to reverse the reforms Shih had previously achieved. Yet this did not take place, and therefore the first possibility is eliminated. The second possibility is that KMT leadership decided to rely on other means of credible commitment external to the judiciary (i.e. pathway 2 in Figure 1), since a senior and dedicated judiciary leadership could at best only control things within his jurisdiction. For example, KMT leadership could enact legislations via the Legislative Yuan, aided by communication strategies that generate a focal point effect that in turn demonstrates credible commitment. However, if this was indeed the case, then one should see either the formal rules within the judiciary being transferred out of it, or *both* the other means of credible commitment *and* the dedicated and senior judiciary leadership being pursued simultaneously. Yet neither took place, and therefore the second possibility is eliminated.⁹⁵

Figure 1: Pathways to Judicial Independence



⁹⁴ The pathway with senior and dedicated judiciary leadership can include strategies within it that bring about their own focal point effects, e.g. the case-review reform in 1995.

⁹⁵ In 1997, the National Assembly amended the ROC Constitution the fourth time since 1990, which included fixing the number of Grand Justices at 15 and eliminating the possibility of reappointment. However, these do not represent a transfer of formal rules from the Judicial Yuan. Also, the significance of the two amendments should not be overrated, because KMT had never abused the system along these two dimensions in the first place. Ever since the late 1950s, the number of Grand Justices has always been around 14-16 people, and reappointment rates have always been very low. Grand justices appointed in 1985 by Chiang had an average age of 65-66 when their terms ended in 1994, and those appointed in 1994 by Lee also had an average age of 65-66 by 2003, which made retirement more reasonable than serving another 8-year term.

The third possibility is that judicial independence was somehow achieved even in the absence of the costliness of attacking the court. Essentially this means that some kind of endogenous benefit model must be at work, in which all the powerful entities including the corporate find it beneficial to have an independent court. This may be possible only if corporations collectively find corruption and other illegal corporate actions damaging. In this scenario, corporations encounter a prisoners' dilemma in which they are better off not engaging in corruption than they do together, but each corporation is better off engaging in corruption if others don't. The solution is to establish a court that significantly and effectively increases the cost of corruption via punishment, and possibly also having the corporations coordinating among themselves to impose punishment upon those members who engage in corruption. Naturally, each corporation has an interest to support judicial independence unless it is the one being prosecuted, in which case it will retaliate. As a result, the court can only prosecute a limited number of corporations regardless of how many of them engage in corruption, lest its independence would be at risk. This would result in multiple equilibria with different percentages of the corporate members engaging in corruption.⁹⁶ In a high-corruption equilibrium (relative to the status-quo), although supposedly no one attacks the court the end goal of lowering corruption level is not attained after all, and therefore judicial independence would not be sustainable as the incentive to support it disappears. In a low-corruption equilibrium (relative to status-quo), judicial independence would indeed be sustainable. But if that is the case, and taken into account that coordination among the corporations is costly, then the implication is that a sustained and significant drop in corruption rate should be observed after 1994 and before 1998 (whereas the credible commitment theory does not imply such reduction). Given the proliferation of 'Heijin' (black-gold

⁹⁶ If the corporations are homogenous, then under reasonable conditions the equilibria are 0% and 100% corruption. When no corporation engages in corruption, then none of them has the incentive to unilaterally deviate to corruption because the single corporation who does so would surely be prosecuted, and it is therefore not worth it. When every corporation engage in corruption, then none of them has the incentive to unilaterally deviate to no-corruption, because the chance of being caught is very small and therefore the expected return of corruption is higher than no-corruption. Realistically, the corporations are not homogenous, and therefore there can be >2 equilibria, each of which can locate anywhere between 0% and 100%. The effect of the corporations being able to coordinate punishment among themselves is the tendency to reduce the number of equilibria and shifts them towards the 0% end, thus increasing the chance of achieving the end-goal of a significantly lower corruption level.

politics)⁹⁷ in Taiwan throughout the 1990s and thereafter, marked by infamous incidents such as the ‘High Court Judges Collective Corruption Case’,⁹⁸ it was unlikely that the corporate had achieved such low-corruption equilibrium. Further confirmation is presented in Table 5. Neither of the corruption indices displays a significant improvement during 1993-1998.⁹⁹

Table 5: Corruption Indices for Taiwan, 1993-2002										
	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
World Competitiveness Yearbook Improper Practices Rating (0 (worst) to 10 (best))	5.8	3.5	4.4							
Transparency International Corruption Perceptions Index (0 (worst) to 10 (best))			5.1	5	5	5.3	5.6	5.5	5.9	5.6

The fourth possibility is that some alternative means of achieving the aforementioned costliness was somehow discovered in lieu of both public support and senior and dedicated judiciary leadership, e.g. foreign intervention, such that KMT leadership may still achieve its goal of unconditional judicial independence without either the said public reputation or a senior judiciary leadership. However, if this is indeed the case, it must also fulfill three additional requirements. First, this alternative means must be absent on and before 1994-1995 but emerged some time before 1998. Second, after its emergence it must be expected to persist long-term. This requirement rules out speculations according to which the corporate sector refrained from obstructing judicial independence in order to help Taiwan’s accession to international organizations from which it would also benefit, because the corporate would be expected to behave otherwise ex-post and therefore it would not be rational for KMT to abolish its initial strategy in

⁹⁷ According to Chin Ko-lin, ‘Black-gold politics’ is ‘the combination of politics, business, and gangsters’, pervasively engaging in clearly illegal activities. Ko-lin Chin, *Heijin: Organized Crime, Business, and Politics in Taiwan* (Armonk, NY: M.E. Sharpe Inc., 2003).

⁹⁸ During 2000-2002, Hung, the chairman of the board of director of a Taiwanese tea company, and Ho, a KMT legislator whose wife was a board director of that same company, blackmailed the bureaucrats in charge of managing the Hsinchu Science and Industrial Park. They requested that the tea company be paid an extra bonus of around TWD 223 million in a transaction in which the Hsinchu Science and Industrial Park bought land from the tea company in its expansion plan. Ho exploited his role as a member of the Information Technology Committee in the Legislative Yuan by threatening to cut the budget for the Hsinchu Science Park Bureau if the request was not met. When the case was brought to the court, Hung and Ho spent TWD 8.5 million bribing four High Court judges to declare them innocent. All the people involved were arrested in 2010 and imprisoned in 2013. Source: Taiwan Supreme Court press releases, Chinese Wikipedia.

⁹⁹ The standard errors of the Transparency International Corruption Perceptions Index figures range from 0.8 to 1.2.

the first place.¹⁰⁰ Third, this alternative source of costliness must be comprehensive, in the sense that whichever way judicial independence is being obstructed, it would be costly. For example, the senior and dedicated judicial leadership appointment is not comprehensive, because it makes it costly to obstruct judicial independence only when matters within the control of the judiciary leadership are involved; whereas good public reputation for the court is very comprehensive, because it imposes costliness however the court is being attacked (as long as it is known). In order to convince KMT leadership to abandon its strategy of appointing senior and dedicated judiciary leadership, which had been crucial to nurturing the judiciary's public reputation (and therefore public support) since 1994 but supposedly hadn't yet succeeded, the alternative source of costliness must be at least as comprehensive as the public support engendered by good reputation. The argument here is that meeting all three requirements is very difficult, making this possibility extremely unlikely.

The fifth and only remaining possibility is simply that the public reputation of the judiciary had already improved by 1998 and therefore the 'seniority' element of the judicial leadership was no longer necessary. The 'dedication' element was still needed as judicial independence reforms were to be continued. Since the other four possibilities turn out to be either impossible or extremely unlikely, it can be concluded from the empirical evidence of Weng's appointment, with near certainty, that this fifth possibility must indeed be the empirical truth. In fact, it can even be argued that Weng's appointment constitutes a superior piece of evidence than a trend of improved reputation revealed by some potentially available survey results, because the survey results would at best point to an improvement in reputation, but not necessarily an improvement beyond the level at which KMT leadership would believe is enough to secure unconditional independence for the ordinary courts. It is this more precise specification of public reputation improvement that is relevant to the reputation hypothesis and for which the Weng appointment offers evidential support.

¹⁰⁰ For example, Taiwan's application to WTO membership was approved in November 2001. To appoint a non-senior judiciary leadership in 2008 would be risky for KMT leadership, because post-2001 the costliness of the corporate sector attempting to obstruct judicial independence would be greatly reduced, but there would still be a good number of years before Weng retired.

Finally, it should be highlighted that Shih resigned on December 2nd 1998,¹⁰¹ and by December 4th, Weng's nomination had already been confirmed.¹⁰² It is unlikely that Shih, who unlike his predecessor Lin had a good politically relationship with President Lee, would notify the public of his resignation without first discussing his intention with Lee *much in advance*. Neither is it likely that the new judiciary leadership could be determined within two days. Therefore the moment KMT leadership first considered a dedicated but non-senior judiciary leadership must be substantially earlier than December 2nd -- probably some time around mid-year in 1998, which marks the *latest* possible time judiciary reputation had significantly improved.

III.d. Constitutional Court Independence

The credible commitment theory predicts that the constitutional court should begin acting independently immediately or shortly after the significant improvement in judiciary reputation. This subsection of the paper is devoted to verify this hypothesis. The task is to determine when Taiwan's Council of Grand Justices ('Council' hereon) began to demonstrate independence from KMT and the KMT-controlled party-state, and compare this result with the conclusion from the previous subsection regarding judicial reputation improvement.

The systematic measurement of constitutional court independence, even as a dummy variable, presents a challenge. It is clear from Table 6 that it is not reliable to utilize dissenting opinions to indicate judicial independence. During 1976-1985 when Taiwan was still under the autocratic rule of a political strongman and the Council was indisputably subservient, the percentage of unanimous opinions was 44%, much lower than the 79% achieved during 2004-2008 when the Council had doubtlessly achieved a higher degree of independence. The number of interpretations, which is arguably a good indicator of one dimension of judicial activism, is not any better. Although judicial independence is a form of, and therefore implies, judicial activism, the reverse is not true.

¹⁰¹ Kong-zhong Liu and Wang Hong-xia, "60 Years of Taiwan Judicial Reform: The Implementation and Challenges of Judicial Independence (in Chinese), " *Dong Fang Fa Xue* 4 (2011): 72.

¹⁰² "Shih is Glad that his Resignation was Approved (in Chinese), " Unknown narrator, *Taiwan Television Company*, December 4, 1998.

Table 6: Diversity in Constitutional Interpretations

	3 rd term: 1967-1976	4 th term: 1976-1985	5 th term: 1985-1994	6 th term: 1994-2001	2004-2008
Number of Interpretations	2	32	149	167	
Percent Unanimous (%)	0	44	58	48	79

Source: Ginsburg, *Judicial Review in New Democracies*, 128.

Garoupa, Grembi, and Lin, "Explaining Constitutional Review", 20.

Garoupa, Grembi, and Lin, who offer the only ‘empirical study on the relationship between Grand Justices and party politics [up to 2011]’,¹⁰³ determine independence based on, for each case, the relation between the party affiliation of the petitioner(s) and that of the President who appointed the presiding Grand Justices, e.g. if the petitioner is affiliated with KMT and the presiding Grand Justices are appointed by a KMT President, then a vote for unconstitutionality would be considered acting in accordance with KMT's preference, and a vote for constitutionality would be considered otherwise. However, although it is claimed that their database only includes cases of ‘obvious political content’ and ‘do not require second-guessing concerning the political interests involved’,¹⁰⁴ in actuality it suffers from several problems. First, in some cases KMT’s preference is by no means clear-cut (e.g. Interpretation No. 371); in other cases, it is not obvious whether the Council has acted for or against KMT (e.g. Interpretation No. 380). Second, the analysis fails to take into account the large variation in the political salience of the cases, e.g. Interpretation No. 499, which declared the 1999 constitutional amendment unconstitutional, is obviously many times more important politically than Interpretation No. 365 which struck down a law that privileged the father over the mother regarding parental rights. Third, certain obviously important and relevant cases are somehow missing from the database, e.g. Interpretation No. 384 struck down five articles of the ‘Anti-Hooligan Law’ that had allowed the police to detain without a judicial warrant any persons deemed as ‘hooligans’, and also began a decade-plus-long tug-of-war between the Council and the Legislative Yuan that also involves Interpretation No. 523 and No. 636. Interpretation No. 445, in which the Council essentially sympathized the communists in terms of their

¹⁰³ Garoupa, Grembi, and Lin, "Explaining Constitutional Review", 17.

¹⁰⁴ Garoupa, Grembi, and Lin, "Explaining Constitutional Review", 18.

right to organize public rallies, is also missing. In general, the issues of which cases are political salient, which cases demonstrate a clear preference on the part of KMT, and which cases demonstrate decisions against KMT's preference on the part of the Council all seem to require case-by-case judgments, while any formulaic approach would risk generating serious measurement errors.

The method adopted in this subsection employs a qualitative approach instead and would limit the analysis to a smaller number of cases. It aims at selecting hopefully close to all of the prominent cases handled by the Council in relation to judicial activism between 1990 and 2001,¹⁰⁵ taking advantage of the aforementioned fact that judicial independence must imply judicial activism in the context of single party dominance. Expert opinions from five different sources are relied upon in selecting these cases. The first is Ginsburg's book chapter on the history and development of the Council. The second is a roundtable discussion between Ginsburg and a group of East-Asian legal scholars. The third is a paper written by Chu, a local scholar, on the Council's judicial activism. The fourth includes two book chapters written by Hwang, Liao, and Chang on the development of constitutional law and human rights in Taiwan. The fifth is a paper written by Chang on judicial review in Taiwan. All of the sources were written after 2001 and discuss extensively about the Council's judicial activism via its Interpretations. The collection here gathers all of the Interpretations mentioned in these sources (all together 43 of them), and each is examined individually for supporting evidences of the Council demonstrating either judicial independence (assigned '1') or subservience (assigned '-1'). The criterion for 'judicial independence' is that *the Council's decision goes against KMT's preference in a politically salient case*. As aforementioned, the political salience, KMT's preference, as well as the alignment of the Council's decision with KMT's preference are discerned subjectively on a case-by-case basis. The purpose of the exercise is to see if a sufficiently clear pattern of cases that demonstrate judicial independence emerges from the analysis. The Interpretations and their associated comments are presented in the Appendix.

¹⁰⁵ 2001 is the year when single party dominance of KMT ended as concluded in Section III.a.i. 1990 is just an arbitrary year chosen before which it was highly unlikely that the Council enjoyed any judicial independence.

It is noteworthy that a politically salient case in which the Council's decision is in compliance with KMT's preference does not necessarily demonstrate subservience, because it is possible that the Council was acting independently and in accordance with its own jurisprudential disposition but it just happened that this decision aligned with KMT's preference.¹⁰⁶ To be sure, the same case does not demonstrate the Council's independence either. Coupled with the fact that the collection includes most if not all of the prominent cases of judicial activism and not only those of judicial independence, one should expect that many of the cases demonstrate neither independence nor subservience (assigned '0').

The comments and the assignments of independence/subservience (the last column) presented in the Appendix illustrate a few important trends. First, a slew of cases involving the protection of basic human rights, yet not politically salient, emerged between 1991 and 1993. At the time, KMT was tested in several nation-wide elections (the 1991 National Assembly and the 1992 and 1995 Legislative Yuan elections) amidst DPP's fast-rising popularity. The party-state was in urgent need to rid itself from a number of its previous unreasonable practices that infringed upon basic human rights, in order to enhance popularity and attract votes, as long as the elimination of such practices insignificantly hampered its power. These are mostly politically trivial cases, such as ensuring people who did not promptly pay their taxes that they would nonetheless collect administrative welfare benefits when needed (Interpretation No. 321), or ensuring that retired civil servants would receive enough retirement funds to meet a certain living standard (Interpretation No. 280), or prohibiting bankrupt fugitives from being imprisoned indefinitely (Interpretation No. 300). Other cases that lack political salience include Interpretation No. 313, No. 365, No. 371, No. 373, No. 382, and No. 472. All of these cases fail to demonstrate the Council's independence from KMT.

Second, throughout the time period covered, there have been many cases that demonstrate judicial activism or even significant empowerment that nevertheless should not be mistaken to be independence. The reason behind the Council's activism, as suggested by Chang, was that the political

¹⁰⁶ There is no fixed criterion for judicial subservience in the analysis.

turbulence and transformation that took place during that decade forced KMT leadership to engage in ‘political deals and subsequent reforms that would not be entirely clear, thus leaving a great deal of [constitutional] ambiguities or inconsistencies subject to judicial interpretations or even interventions... even [generating] institutional discrepancies mostly with regard to governmental structures.’¹⁰⁷ Assuming this new role, the Council served to settle disputes within the government (Interpretation No. 325, No. 387, No. 419, No. 520) and help clearing the way for political reforms (Interpretation No. 261). It might, through this process, occasionally gain power against other branches (Interpretation No. 251), or empower itself vis-à-vis other courts within the judiciary (Interpretation No. 242, No. 392, No. 436). Nevertheless, all of these cases merely demonstrate the Council’s activism and relative empowerment within a larger system that was still firmly controlled by KMT. It can be said that the Council identified a prominent role in serving the dominant party, but it did not demonstrate through these cases an independence from KMT.

In addition, there are a few cases in which the Council seemingly was proactively ruling against certain politically important institutions of social control favored by the KMT-controlled state, while in fact it was merely addressing some technical inconsistencies within the existing law (Interpretation No. 380, No. 394).

Finally, the cases that truly demonstrate the Council’s independence are identified to be Interpretation No. 384 in 1995, No. 445 and No. 450 in 1998, No. 499 in 2000, and No. 523 in 2001. Ideally, a certain year would be identified before which there were no cases at all that demonstrate independence and after which there were many that are also chronologically clustered. This would be the ideal pattern. In the results here, the latter four cases are relatively close to each other time-wise, and therefore the beginning of 1998 seems to be the time when the Council first demonstrated judicial independence. The reason why 1998 is a better choice than 1995 is that the case in 1995 seems to be a relatively isolated incident followed by a relatively long time span before the next incident of

¹⁰⁷ Ginsburg et al., "Judicial Review", 170.

independence, during which a case that demonstrates subservience took place in late 1996 (Interpretation No. 419). These two characteristics make it reasonable to interpret the 1995 incident of independence, though genuine, as idiosyncratic and not systematic. As such, although the pattern would be much more clear-cut if there are more ‘1’ cases during the period immediately after 1998 and if the 1995 case is absent, the existing overall pattern nonetheless still suggests early 1998 as the moment judicial independence dawned upon Taiwan’s constitutional court. Furthermore, it is already concluded in Section III.c. that judicial reputation significantly improved, at the latest, some time during 1998 but earlier than late 1998. Therefore although strictly speaking it is still possible that judiciary reputation came after the Council’s independence (e.g. the former in mid-1998 while the latter in early 1998), the boundary values of the two events are close enough to conclude that they took place roughly at the same time/year, thus offering empirical support to the hypothesis associated with this subsection.

IV. Conclusion

Contrary to Lin Yang-kang's famous assertion that 'judicial [independence] is like Caesar's wife whose chastity must be above suspicion', the attainment of judicial independence in reality is often rare and hard-earned. It is therefore an important and meaningful exercise to learn from historical experience and identify the various causal mechanisms through which it can be achieved. This paper argues that even under single (political) party dominance, the ordinary courts and the constitutional court in a newly democratized setting can nonetheless attain judicial independence as long as the regime is a mature developmental state standing in tension with a powerful private corporate sector. A theoretical framework that is based on an alternative interpretation of power diffusion and employs different forms of credible commitment strategies is constructed to explain the emergence of judicial independence in Taiwan. The causal mechanism specified by the theory is tested by process-tracing: through a historical analysis of judicial reforms pertaining to the ordinary courts and a qualitative analysis of the Grand Justices' interpretations mainly during the 1990s, ample empirical evidences supportive of the theory are identified. The paper fills a major gap in explaining the presence and absence of judicial independence among the East Asian developmental states.

APPENDIX: COMMENTS ON SELECTED INTERPRETATIONS OF THE COUNCIL OF GRAND JUSTICES

Inter-pretation	Date	Source	Comment	Independence
242	6/23/1989	1	This is the first Supreme Court precedent to be declared unconstitutional, and as such the case has important implications towards the power balance between the Council of Grand Justices and the Supreme Court. But that is not relevant to the Council's independence from the party. Also the case (about marriage) is clearly not politically salient.	0
251	1/19/1990	3	The Council ruled that the police had no authority to inflict punishment that restricted one's physical freedom; this authority should belong to the ordinary courts. Given that both the police and the ordinary courts likely were instruments of the KMT in 1990, this case has little relevance in terms of the Council's independence from the dominant party.	0
259	4/13/1990	4	Hwang, Liao, and Chang provided the following note: 'Under article 113, § 1, clause 2 of the 1947 ROC Constitution, the [regional] Governor shall be elected by a popular vote. Since 1947, such elections were never held. In addition, all the local elections held since 1950 were done under authorization of the national government--Executive Yuan. Such a practice and all such administrative regulations were even declared constitutional by the Council of Grand Justices [in Interpretation No. 259].' (Hwang, Liao, and Chang, 61-62) This decision was therefore an indication of subservience, mainly because the Council upheld something that was too obviously unconstitutional, according to these legal experts.	-1
261	6/21/1990	1,3,4	Despite the obvious political significance of this Interpretation, this case does not demonstrate judicial independence from KMT. The dominant party was in great need of new blood while those delegates elected in 1947 were old and dying. President Lee, in charge of KMT, was aggressively pursuing Taiwanization. The Grand Justices were simply acting in the interest of KMT by ordering the members of the national representative bodies to leave office by the end of 1991.	0
274	2/22/1991	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
275	3/8/1991	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
277	3/22/1991	4	The Interpretation affirms that the central government's control over regional governments' finances was constitutional. Hwang, Liao, and Chang believe that it indeed was constitutional jurisprudentially speaking (Hwang, Liao, and Chang, 61), and as such this case is not relevant.	0
280	6/14/1991	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
283	8/6/1991	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
288	12/13/1991	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
291	2/28/1992	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
293	3/13/1992	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
294	3/13/1992	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
300	7/17/1992	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
306	10/16/1992	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0

Inter-pretation	Date	Source	Comment	Independence
313	2/12/1993	4	'The Council decided in favor of the airline companies, holding that the conditions and the amount of fines imposed on the defiance of administrative duties must be prescribed by law. Even if the law granted the administrative agency the right to make a rule, the content and scope of that delegation must be clear and specific.' (Hwang, Liao, and Chang, 102) Similar to Interpretation 380, the emphasis was on technical inconsistencies. The case was not related to judicial independence, and was not politically salient.	0
316	5/7/1993	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
318	5/21/1993	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
320	6/18/1993	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
321	6/18/1993	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
325	7/23/1993	4	The Council clarified the jurisdictions of the Control Yuan and the Legislative Yuan. It played the role of settling internal disputes within the government. There was no relevance to judicial independence.	0
334	1/14/1994	4	The Executive Yuan and the Legislative Yuan had different opinions as to what should fall under the terms 'government bonds' and 'government debt', and asked the Council to adjudicate on the issue. The Council fulfilled its role in settling disputes within the KMT-controlled government, and therefore this case is irrelevant.	0
365	9/23/1994	2	Professor Lee Ju-li lists this case as an example of the Council 'demonstrating to the society that it is an independent political and legal institution...and protecting fundamental rights.' While the latter was demonstrated, the issue of the final right of decision in case of parental disagreement clearly lacks the political salience and relevance required to demonstrate the Council's independence.	0
371	1/20/1995	1,4,5	It is difficult to judge whether KMT would be in support of striking down the provisions that prevented lower court judges from referring cases to the Council. But in any case, in light of the low response rate thereafter (only 12 petitions from the lower courts during the subsequent 10 years (Chang, 80)), this case can be deemed politically non-salient.	0
373	2/24/1995	1	Ginsburg incorrectly describes Interpretation No. 373 as 'allowing teachers to form unions and voiding provisions of the Labor Union Law to the contrary.' (Ginsburg, 151) and associates the incident with opposing KMT's 'authoritarian corporatism'. Instead, Interpretation No. 373 allowed 'technicians and journeymen' of the education industry, a much less politically salient group, to form unions, because they were deemed not directly connected to education. KMT's policy of not allowing teachers to form unions was not at all challenged, as this was deemed in conflict with the citizen's right to be educated.	0

Inter-pretation	Date	Source	Comment	Independence
380	5/26/1995	1	The Council in effect freed the universities from the Education Department's mandating of required subjects. Ginsburg's interpretation is that the Council 'sought to dismantle the mechanisms of [KMT's] authoritarian control' that included 'ideological courses in Sun Yat-sen's thoughts (Ginsburg, 150). While Sun Yat-sen's thoughts are rarely associated with authoritarian control, the even more important point is that in this case the Council merely pointed out certain technical inconsistencies between the University Act and the 'Enforcement Rules' section of the University Act, instead of seeing the mandate of required subjects itself being in violation of any fundamental rights stipulated in the Constitution. Time and again the Interpretation emphasizes that 'A university shall... <i>to the extent permitted by law</i> [italics added], be entitled to the right of self-government', which means that if the KMT-dominated legislature so desired, it could amend the University Act so that the Education Department would have the power to mandate required subjects. As such, Interpretation No. 380 did not demonstrate that the Council attempted to act against KMT.	0
382	6/23/1995	2	Professor Lee Ju-li lists this case as an example of the Council 'demonstrating to the society that it is an independent political and legal institution...and protecting fundamental rights.' While the latter was demonstrated, the issue of whether an expelled student is entitled to bring an administrative appeal against the school clearly lacks the political salience needed to demonstrate the Council's independence.	0
384	7/28/1995	1,3,4	The Council declared unconstitutional five articles of the 'Antihooligan Law', which allowed the police to detain without a judicial warrant any persons deemed as 'hooligans'. Judging from the facts that: 1) this is a political salient issue with broad implications to civil rights, 2) the KMT-dominated Legislative Yuan waited until one day before the Council-imposed deadline to pass a new law that did not really address the issue, and 3) the Council struck down the new law with Interpretation 523, both Interpretations signify judicial decisions against the preference of KMT, and thus demonstrate the Council's independence.	1
387	10/13/1995	4	The newly elected but still KMT-dominated Legislative Yuan requested that the Premier should resign in accordance with the procedure of parliamentary democracy, while the Premier disagreed, arguing that he only answered to the President who appointed him. Hwang, Liao, and Chang commented that this is a 'salient case of judicial coordination of constitutional revisions' (Hwang, Liao, and Chang, 100-101). The Council played an important adjudication role in settling this internal dispute, but the case is not much related to independence. Neither was Lien Chen's resignation as the Premier a politically salient event, as he moved on to become the Vice President of Taiwan while Siu, another KMT member, became the Premier.	0
390	11/10/1995	3	There is no evidence that the Council's decision was against KMT's preference. It can be argued that it was in the interest of KMT, and Lee in particular, to facilitate business-government relationship through clearer regulations. In addition, the case does not seem politically salient.	0
392	12/22/1995	1,4	The Council ruled that prosecutors had no power to authorize detention of civilians without judicial warrants. This involved clarifying whether the prosecutors were to be included as part of the court, which was an internal affair of the judiciary.	0

Inter-pretation	Date	Source	Comment	Independence
394	1/5/1996	1	The Council did not rule that the Ministry of the Interior loses its power to make 'regulations for the administration of the construction industry', including the right to administrative reprimand towards certain technicians if they were unable to carry out their responsibilities 'as a result of leaving the country or another reason'. It only decided that the statute was too vague, and required clarification. Ginsburg interpreted the condition regarding 'leaving the country' as KMT's tactic to restrict people's freedom of movement. But the actually text read 'leaving the country... for over a month'. This substantial time span means that not many people would be affected, making it unlikely an intentional tool to restrict people's freedom of movement.	0
419	12/31/1996	1,4	This is a classic case in which the Council played the role of settling an internal conflict within the regime. The issue was whether Lien Chen could serve as the Vice-President of Taiwan and the President of the Executive Yuan simultaneously, with President Lee and the Executive Yuan on one side and the Legislative Yuan on the other. Clearly this case cannot demonstrate the Council's independence regardless of its decision. However, unlike other similar cases the Council did not play its coordinator role well. Its long and notoriously ambiguous Interpretation actually offered some support to the criticism that the Council was, up to that point, a 'tool of the mainstream faction of the KMT' (Ginsburg, 153), afraid to offend either side.	-1
436	10/3/1997	1	The Council held that military trials would remain outside the jurisdiction of the Judicial Yuan but were subject to appeal before ordinary courts. This was one major step towards consolidating the power of the Judicial Yuan, but it was not obvious that KMT had a preference against it.	0
443	12/26/1997	1	The Council declared unconstitutional the prohibition of men to leave the country before they completed the required military service. Not politically salient.	0
445	1/23/1998	1	The Council held that 'effective immediately, police cannot disapprove applications for public rallies advocating secessionism and communism', even though rallies advocating secessionism and communism remain illegal. This move was clearly acting against KMT, since the Council was not only in support of the right to organize public rallies (a collective action against the then-still-dominant KMT), but also allowing certain leeway to the communists despite KMT's long-held antagonism against communism. The political salience was also apparent.	1
450	3/27/1998	1	The Council held that Article 11 of University Law, which required all universities to allow military counselors on campus, was unconstitutional. At the time, about 5000 of these counselors were placed in all college dormitories in Taiwan, and they were 'widely viewed as an instrument of political control' (Ginsburg, 150). KMT, as the dominant party, had the interest of preserving this institution, and thus it was very likely that the Council was acting against KMT's preference. According to legal scholar and Grand Justice Chen Shin-min, Interpretation No. 450 is radical because it marks the Council's unprecedented move in conferring a higher priority to university self-governance than the principle of legal reservation. Also, it expands the scope of self-governance from teaching activities to including institutional management. ¹⁰⁸	1
471	12/18/1998	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0
478	3/19/1999	4	This case is about protection of basic rights but it does not involve a politically salient issue.	0

¹⁰⁸ Shin-min Chen, "Which is More Important – University Self-Governance or The Principle of Legal Reservation? (in Chinese)", *National Policy Foundation Commentary*, August 9, 2001, <http://www.npf.org.tw/print?sid=696/>.

Inter-pretation	Date	Source	Comment	Independence
472	1/29/1999	3	The Council supported a compulsory national health insurance program. The case does not seem to be politically salient. There was no evidence that KMT was against it.	0
499	3/24/2000	4	Arguably the most important constitutional case in Taiwan, the Council declared unconstitutional the National Assembly's 1999 constitutional amendments, through which the National Assembly's delegates attempted to extend their tenure for two extra years and offered no roadmap to the institution's supposed total replacement by the Legislative Yuan. The delegates' (both KMT and DPP members) fight for survival contradicted their respective parties' shared official position on the issue. As such, although Interpretation No. 499 is said to 'mark the peak of judicial power' (Hwang, Liao, and Chang, 76), the decision itself is not a demonstration of the Council's independence because it was acting against KMT's and DPP's delegates in the National Assembly but not KMT and DPP themselves. Nevertheless, the timing of the Interpretation was telling. Media reports on the issue connected it with the 2000 presidential election, in that the public's outrage over the constitutional amendments and the parties' (but especially KMT's) inability to resolve the issue would certainly hurt their prospects in the event. ¹⁰⁹ As such, there would be tremendous political demand for the Council to rule against the delegates before the presidential election on March 18th 2000. It turned out that although the Council ruled against the delegates, the Interpretation was released, likely strategically, a few days after the election. It is the timing of the event that demonstrated its independence.	1
520	1/15/2001	2,5	The Council basically ruled that the Executive Yuan led by President Chen could not independently decide to halt the construction of a nuclear plant, and must instead seek approval from the Legislative Yuan (where KMT still had a majority). By this time power diffusion had been achieved between KMT and DPP, so there is no ground to decide whether the Council demonstrated independence.	0
523	3/22/2001	1,4	See Interpretation 384.	1

Sources:

- 1: Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge, UK: Cambridge University Press, 2003), chapter 5.
- 2: Tom Ginsburg et al., "Judicial Review in New Democracies: Constitutional Courts in Asian Cases," *National Taiwan University Law Review* 3, no. 2 (2008): 143-81.
- 3: Jou-Juo Chu, "Global Constitutionalism and Judicial Activism in Taiwan," *Journal of Contemporary Asia* 38, no. 4 (2008): 515-34.
- 4: Jau-Yuan Hwang, Fort Fu-Te Liao, and Wen-Chen Chang, "Development of Constitutional Law and Human Rights in Taiwan Facing the New Century," *IDE Asian Law Series*, no. 24 (2003): 27-106.
- 5: Wen-Chen Chang, "The Role of Judicial Review in Consolidating Democracies: The Case of Taiwan," *Asia Law Review* 2, no. 2 (2005): 73-88.

Independence:

- 1: The case/Interpretation demonstrates the Council's subservience to the dominant party or the party-state.
- 0: The case/Interpretation does not offer any conclusion regarding the Council's independence.
- 1: The case/Interpretation demonstrates the Council's independence from the dominant party and the party-state.

¹⁰⁹ "Sugar-Coating the Self-Serving Scheme, and the Rough Road to Reform (in Chinese)," *China Times*, September 5, 1999, <http://forums.chinatimes.com/report/assembly/88090509.htm>. Ming-hui Peng, "How Voters May Redeem Themselves Amidst The Self-Serving Term Extension Case (in Chinese)," (blog) <http://www.reocities.com/Athens/Delphi/6349/bonn06-04.htm>.

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